(1)

91-216

Supreme Court, U.S.
FILED
JUL 30 1991
OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

PHILLIP MATTHEWS,

Petitioner,

v.

GREENEVILLE LIGHT AND POWER SYSTEM, ET. AL.,

Respondents.

WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Bob McD. Green
204 East Unaka Avenue
Johnson City, TN 37601
(615) 928-6551
Counsel of Record

John T. Milburn Rogers
Kenneth C. Hood
Debra A. Wall
100 South Main Street
Greeneville, TN 37743
(615) 639-5183
Of Counsel

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in holding that the actions of the Tennessee Valley Authority are exempt from judicial review by the federal courts under the Administrative Procedures Act, 5 U.S.C. Section 701 et. seq., no matter how flagrantly that agency violated Congressional policy as set forth in the provisions of the Tennessee Valley Authority Act, 16 U.S.C. Section 831(j)?

2. Regardless of whether the Tennessee Valley Authority is exempt from administrative review, does a ratepayer not have standing to pursue a cause of action for breach of the power contract between the Tennessee Valley Authority and the Town as the third party beneficiary of the contract?

3. Even in the absence of the Tennessee Valley Authority as a party, does the United States District Court not have federal question jurisdiction over the remaining parties under 28 U.S.C. Section 1331 based upon the inherent questions of federal law involved in the interpretation, construction, and application of the FERC's Uniform System of Accounts as published in the Code of Federal Regulations at 18 C.F.R. Section 101, et. seq.?

4. Did the United States District Court not err in granting the Respondents' motions for Summary Judgment when it had previously thwarted the Petitioners' effort to take discovery depositions to develop the proof necessary to establish the contested issues of fact essential to withstand the motions for summary judgment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	6
ARGUMENT	24
A. The Petitioner has Standing for Review Under the TVA Act . . .	28
B. The Petitioner has Standing as a Third Party Beneficiary of the Contract Between the GLPS and the TVA	31
I. The District Court erred in holding that the actions of the Tennessee Valley Authority are exempt from judicial review	33
II. A ratepayer does have standing to pursue a cause of action for breach of the power contract	47

TABLE OF CONTENTS - (Continued)

Page

III. The United States District Court does have federal question jurisdiction 50

IV. The United States District Court erred in granting the Respondent's motions for Summary Judgment . . 55

CONCLUSION 58

APPENDIX

TABLE OF AUTHORITIES

Cases:	Page
Apter v. Richardson, 510 F.2d 351 (7th Cir. 1975) . .	29
Banco De Ponce v. Hinsdale Supermarket Corp, 663 F. Supp. 813 at 817 (E.D.N.Y. 1987)	51
Berberich v. United States, 5 Cl. Ct. 652 (1984), aff'd 770 F.2d 179 (Fed. Cir. 1985) . .	32
Bossier Parish School Board v. Lemon, 370 F.2d 849 (5th Cir. 1957)	49
Christopher v. Cavallo, 662 F.2d 1082 (4th Cir. 1981) . .	51
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)	37
Clearfield Trust Co. v. United States, 318 U.S. 573, 63 S.Ct. 573 (1943)	33
Confederated Housing Associates, Inc. v. Department of Housing and Urban Development, 538 F. Supp. 1158 (E.D. Ark. 1982)	53

TABLE OF AUTHORITIES - (Continued)

Cases:	Page
Crass v. Tennessee Valley Authority, 460 F. Supp. 941 (E.D. Tenn. 1978), aff'd 627 F.2d 1089	45
Dillion v. AFBIC Development Corp., 732 F. Supp. 572 (D.C. Ala. 1976), aff'd in part, rev'd in part, 597 F.2d 556 .	49
Elm v. National R. Passenger Corp., 732 F.2d 1250, cert. den. 469 U.S. 982, 83 L.Ed.2d 322, 105 S.Ct. 387	36
Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3rd Cir. 1964)	53
Ferguson v. Electric Power Board of Chattanooga, Tenn., 378 F. Supp. 787, aff'd 511 F.2d 1403 (1974)	40
Gibson and Perin Co. v. City of Cincinnati, 480 F.2d 936 (6th Cir. 1973)	30
Heckler v. Chaney, 470 U.S. 821, 84 L.Ed.2d 714, 105 S.Ct. 1649 (1985)	37

TABLE OF AUTHORITIES - (Continued)

Cases:	Page
Heckler v. Volpe, 470 U.S. at 828-829	37
Holbrook v. Pitt, 643 F.2d 1261, 1270 (7th Cir. 1981) .	33
Kinsey v. Nestor Exploration Ltd., 604 F. Supp. 1365 (E.D. Wash. 1985)	51
Las Vegas Hawaiian Development Co. vs. Securities and Exchange Comm., 466 F. Supp. 928 (D.C. Hawaii, 1979)	45
Lockhart v. Hoensteine, 411 F.2d 455 (3rd Cir. 1969); Cert. Den. 396 U.S. 941, 234 L.Ed.2d 244, 90 S.Ct. 378	56
Murphy v. Colonial Federal Savings and Loan Association, 388 F.2d 609 at 611 (2nd Cir. 1967)	51
Norfolk and Western Co. v. United States, 641 F.2d 1201 (6th Cir. 1980)	49
Poirrier v. St. James Parrish Police Jury, 372 F. Supp. 1021 (E.D. La. 1974)	45

TABLE OF AUTHORITIES - (Continued)

Cases:	Page
Slagle v. United States, 228 F.2d 673 (5th Cir. 1956) . .	57
United States v. Standard Oil Co. of Calif., 332 U.S. 301, 67 S. Ct. 1604 (1947) .	33

STATUTES:

5 U.S.C. Section 552	35
5 U.S.C. Section 701	2
5 U.S.C. Section 702	31
12 U.S.C. Section 1464(a) . .	52
16 U.S.C. Section 706	2
16 U.S.C. Section 831i . . .	4
16 U.S.C. Section 831n-4(f) .	13
28 U.S.C. Section 1254(1) . .	1
28 U.S.C. Section 1331 . . .	5
Tennessee Code Annotated Section 7-52-117	13

TREATISES:

Tennessee Jurisprudence, "Contracts," Section 85, "Third Party Beneficiaries" .	33

REGULATIONS:

Code of Federal Regulations
at 18 C.F.R. Section 101 . . 52

Code of Federal Regulations
at 12 C.F.R. Section 544.1 . 52

Federal Rules of Civil
Procedure, Rule 56 4

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Tennessee was rendered on March 9, 1990, and is set forth in the Appendix at A-i. The decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court's decision was rendered on May 2, 1991, and is set forth in the Appendix at A-xviii.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The final disposition of this case below was reaffirmation of the lower court's decision filed by the Court of Appeals for the Sixth Circuit on May 2, 1991.

STATUTORY PROVISIONS INVOLVED

Administrative Procedures Act, 5 U.S.C.

Section 701.

> **Right of Review:** A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.
>
> . . .
>
> (a) This chapter applies, according to the provisions thereof, except to the extent that -
>
> (1) Statute proclude judicial review; or
>
> (2) Agency action is committed to agency discretion by law.
>
> (b) For purpose of this chapter--
>
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;
(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to disputes determined by them;
(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or in occupied territory; or
(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title four, or sections 1622, 1884, 1891-1902 and former section 1641(b)(2) of title 50 appendix.

Administrative Procedures Act, 16 U.S.C.

Section 706.

To the extent necessary to decision and when presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the term of an agency action. The reviewing court shall ---

(1) Compel agency action unlawfully withheld or reasonably delayed; and

(2) Uphold unlawful and set aside agency actions, findings,

and conclusions found to be --

> (a) Arbitrary, capricuous and abuse of discretion, or otherwise not in accordance with law;
>
> . . .
>
> (c) In excess of statutory jurisdiction, authority, or limitations or short of statutory right;

The TVA Act, 16 U.S.C. Section 831i

> This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and such manner as to encourage increased domestic and rural use of electricity. (Emphasis added).

Federal Rules of Civil Procedure, Rule 56

(f) **When affiants' affidavits are unavailable:** should it appear that the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

STATEMENT OF THE CASE

The Petitioner, Phillip Matthews, individually and as class representative, filed a complaint on the 10th day of November, 1988, against the Greeneville Light and Power System (hereinafter referred to as GLPS), the Tennessee Valley Authority (hereinafter referred to as TVA), Robert Lay, individually and as manager of the GLPS, the Town of Greeneville, Norman Williamson, as acting superintendent, Charles Worley, Paul Hite, Jess Musick, J.E. Bullen, as members of the Board of Public Utilities of the Greeneville Light and Power System, in the United States District Court for the Eastern District of Tennessee. The jurisdiction of the District Court was invoked based upon 28 U.S.C. Section 1331, which grants district courts "original jurisdiction of all civil actions arising under the

Constitution, laws, or treaties of the United States. The Complaint alleged that the GLPS, under the directives of Robert Lay, had failed to comply with, and the TVA had failed to enforce, the Federal Energy Regulatory Commission's Uniform System of Accounts as required by the power contract between the TVA and the Town of Greeneville. The complaint asserted that as a result of this failure to observe the required accounting guidelines, the expenses of the GLPS were grossly distorted, which resulted in customers of the GLPS being charged excessive power rates and in the GLPS accumulating cash reserves in excess of Ten Million Dollars ($10,000,000.00). The complaint prayed that the United States District Court issue a writ of mandamus to compel compliance with the accounting guidelines, that the action be certified as a class action, and that the

court enter a judgment against the Respondents in the amount of the excess accumulated reserves which would be paid to members of the class. (R. 1: Complaint, pp. 4-7; 9-10)

The complaint also sought to recover for an improper bond recall in count two of the complaint, but that count was voluntarily dismissed by the plaintiff. (R. 1: Complaint, pp. 8-9; R. 45, Motion to Dismiss Count II, pp. 1-2)

The GLPS filed a motion to dismiss on the 17th day of January, 1989, on the grounds that the GLPS was not sui juris, but rather was simply an agency of the Town of Greeneville. (R. 5: Motion to Dismiss in Behalf of the Defendant, GLPS, p. 1) Lay filed a motion to dismiss on the same day seeking dismissal, inter alia, on the grounds that the complaint failed to state a claim, that the Petitioner lacked standing, and that the

TVA rate structure is not subject to judicial review. (R. 7: Motion to Dismiss on Behalf of Robert Lay, pp. 1-2) TVA filed a motion to dismiss on the same grounds as Lay, but moved in the alternative for Summary Judgment. (R. 10: TVA's Motion to Dismiss or, in the Alternative, For Summary Judgment, pp. 1-2)

In support of its alternative motion for summary judgment, TVA filed the affidavits of Richard C. Crawford, Vice President of Transmission and Customer Services for TVA, and of Freddy R. Horne, Manager of the Eastern Region Offices of TVA's Transmission and Customer Services. Crawford explained the purposes of the TVA Power System and its system for setting rates with its distributors. A copy of the power contract between TVA and the Town of Greeneville was attached as Exhibit A to his affidavit. That

affidavit admitted that the GLPS had in fact accumulated Ten Million Dollars in accumulated reserves. The affidavit further admitted that provisions of the power contract require each distributor to follow the FERC Uniform System of Accounting, but asserted that this was not a legal requirement, but a mere administrative convenience. (R. 12: Affidavit of Richard C. Crawford, pp. 1-7, references above to paragraphs 9, 10, 11)

In the affidavit of Freddy Horne, he stated that the GLPS was under his administrative jurisdiction. He admitted that TVA field accountants who had inspected the financial records of the GLPS raised questions about whether the amount of the system's cash reserves was excessive and whether the GLPS was properly allocating costs to its expense and capitalization accounts.

Nevertheless, he admits that TVA took no enforcement action. (R. 11: Affidavit of Freddy Horne, pp. 1-3, references above to paragraphs 2-4)

In response to the motion for summary judgment, on the 27th day of February, the Petitioner filed a Notice of Depositions, indicating an intent to depose Freddy R. Horne, Richard C. Crawford, Latain McGhee, and such person or persons designated by counsel for TVA as having knowledge of the manner and method by which rates are calculated for the purposes of contract negotiations with distributor utilities. Said depositions were scheduled for March 7, 1989. (R. 16, Notice of Depositions, pp. 1-2)

Each of the Respondents filed motions for a protective order seeking to avoid the depositions. (R. 17, Robert Lay's Motion for Protective Order, pp. 1-

3; R. 19, TVA's Motion for a Protective Order, pp. 1-3; GLPS's Motion for a Protective Order, pp. 1-3) By an Order entered March 3, 1989, the Respondent's motions for a protective order were granted and the Petitioner was precluded from taking the depositions needed to counter the affidavits filed by the TVA in support of its motion for Summary Judgment. (R. 27: Order, pp. 1-2)

On the 24th day of March, 1989, the Petitioner filed an Amended and Restated Complaint. The Amended and Restated Complaint contained the following changes from the original complaint:

(1) The GLPS was dropped as a defendant since it was not sui juris and the Town of Greeneville and the individual power board members added as parties defendant;

(2) The Petitioner alleged that the TVA was violating congressional policy

set forth in the act by failing to set rates that would achieve the object that "power be sold at rates as low as are feasible," (16 U.S.C. Section 831n-4(f);

(3) The Petitioner alleged that there were mandatory provisions in the power contract requiring compliance with FERC accounting guidelines and requiring rate reduction whenever there were excess reserves;

(4) The Petitioner alleged that he had standing on behalf of himself and the proposed class as third party beneficiaries of both the power contract and the TVA Act;

(5) The Petitioner alleged that Lay failed to perform ministerial tasks in keeping proper books and records as required by Tenn. Code Ann. Section 7-52-117 and further willfully violated the provisions of the power contract,

subjecting him to personal liability as a public official;

(6) The Petitioner alleged that the Town and the TVA breached the power contract and that Lay acted to tortiously induce the breach; and

(7) The Petitioner alleged that the actions of the TVA were subject to review under the Administrative Procedures Act, 5 U.S.C. Section 701, et. seq. (R. 29: Amended and Restated Complaint, pp. 1-23)

The Petitioner filed his affidavit in opposition to TVA's Motion for Summary Judgment. The Petitioner, a resident of Greeneville, Tennessee, and consumer of TVA power supplied through the GLPS, served as controller for the GLPS from January, 1977 through August, 1988, when he was terminated by Lay because of his efforts to publicly expose the abuses at the GLPS. He indicated that during his tenure at the GLPS, he had repeatedly

attempted to obtain the information concerning rate structures which he sought to obtain in the depositions of Horne, Crawford and McGhee, but had been repeatedly refused. In the affidavit, he described in detail the various distortions of income and expense resulting from the manner in which the GLPS accounted for labor costs on capital projects, for sums paid to independent contractors for the system, for underground electrical service, and for sums spent on capital improvements. In paragraph 9, he reviewed the total distortions caused by these accounting practices in relationship to the system's operating income and showed how over a nine year period, the distortions exceeded 85% of operating income and totaled over Ten Million Dollars. The Petitioner also relates in his affidavit how he sought to inform TVA auditors of

the problem in the hopes that they would take remedial action. Although TVA auditors were concerned about these gross distortions and issued recommendations for multiple rate level reductions, nothing was ever done by TVA to correct the abuses. (R. 33: Affidavit of Matthews, pp. 1-17)

At the request of the District Attorney General for the State of Tennessee, the Division of Municipal Audit, Department of Audit, of the Comptroller of the Treasury for the State of Tennessee conducted an extensive investigation into the financial records and procedures of the GLPS. The sworn report prepared by that office was filed in opposition to the Motion for Summary Judgment on June 21, 1989. That report revealed "improprieties in areas related to improper accounting and false reporting practices, unauthorized

transactions, possible illegal compensation to the system manager (Lay), questionable investment policies, unlawful use of sales tax exemption, noncompliance with bid law, and lack of internal accounting control over the sale of surplus materials." Said investigative report confirmed the Petitioner's allegations that the GLPS was distorting income and expenses by failing to abide by FERC accounting guidelines. The first four findings of said report confirmed violation of the FERC Accounting Guidelines. (R. 60: Affidavit of Dennis Dycus, pp. 1-18)

The Petitioner filed a Motion on March 24, 1989, requesting the court to reserve a ruling on TVA's motion for summary judgment until it had ruled on the motions to dismiss and afforded the appellant additional time for discovery depositions if the motions to dismiss

were denied. (R. 35, Motion to Continue Ruling on Motion for Summary Judgment, pp. 1-3)

Each of the Respondents filed a motion to dismiss the Amended and Restated Complaint on various grounds. The Town and power board members along with the TVA also moved in the alternative for summary judgment. (R. 43, Lay's Motion to Dismiss Amended and Restated Complaint, pp. 1-3; R. 46: Motion to Dismiss or, in the Alternative, for Summary Judgment Filed on Behalf of the Town and the Power Board Members; pp. 1-3; R. 50: TVA's Motion to Dismiss Plaintiff's Amended and Restated Complaint or, in the Alternative, for Summary Judgment, pp. 1-3).

The Town filed the affidavits of Normal Williamson, interim manager of the GLPS after Lay was fired by the power board, and the affidavit of Jess Musick,

secretary treasurer of the power board, in support of its motion for summary judgment. These affidavits state that the GLPS hired Arthur Anderson and Company to investigate the various accounting problems at the GLPS. In his affidavit, Williamson admits that the private auditors hired by the GLPS confirmed numerous instances of improper accounting for expenses, that a policy and procedures bulletin was drafted in an effort to correct these accounting distortions, that a system of internal controls and procedures were developed to help prevent future occurrences of these accounting abuses, and that a policy manual was needed to bring the GLPS into compliance with the FERC accounting guidelines. The affidavit of Jess Musick established that the power board took official action to implement each of these remedial measures found necessary

to correct the accounting distortions at the GLPS. (R. 48: Affidavit of Williamson, pp. 1-3; R. 49: Affidavit of Musick, pp. 1-3 with attachments)

Peculiarly enough, the Arthur Anderson report was not filed by the Town, but by TVA as an attachment to the affidavit of Robert C. Glinski, attorney for the TVA, who happened to be at the power board meeting where the report was presented. That report, which was not sworn to under oath by the auditors preparing it, confirmed that the GLPS had accumulated over Ten Million Dollars of reserves, confirmed that capital improvements had been expensed so as to distort income, confirmed that the GLPS had not sought bids for the services of independent contractors, and confirmed other deficiencies in the accounting procedures of the system. (R. 53:

Affidavit of Glinski, with attachment, pp. 1-6)

Because the report of Arthur Anderson and Company had not been sworn to by one of the auditors conducting the investigation, the Petitioner moved to strike the affidavit from the record. (R. 57: Motion to Strike, pp. 1-2). The District Court never ruled on that motion.

On the 9th day of March, 1990, United States District Judge R. Allan Edgar issued a memorandum opinion stating that he was treating each of the motions to dismiss as a motion for summary judgment. The Court held that it lacked power to exercise judicial review over the actions of the TVA and dismissed the claims against it. The Court then found that in the absence of TVA, it lacked an independent basis for subject matter jurisdiction over the remaining

defendants and dismissed the claims against them with prejudice. An order to that effect was entered immediately thereafter. (R. 74: Memorandum, pp. 1-8; R. 75, Order, p. 1)

The Petitioner filed a motion to alter or amend judgment or to reconsider pursuant to Rule 59 of the Federal Rules of Civil Procedure. In that motion, the Petitioner asserted the following grounds for the Court to reconsider its decision:

(1) The memorandum opinion failed to address the power of the court to grant relief under the theory that the Petitioner and the proposed class were third party beneficiaries of the power contract;

(2) The court failed to recognize that the FERC accounting guidelines provided a genuine and substantial basis for the exercise of federal question

jurisdiction even in the absence of the TVA; and

(3) The court improperly dismissed the claims against the other defendants with prejudice precluding the claim on the merits.

(R. 76, Motion to Alter or Amend Judgment or to Reconsider, pp. 1-3)

On the 8th day of May, 1990, the Court issued another memorandum opinion and order which modified its earlier decision to provide that the dismissal of the claims against the remaining defendants was without prejudice, but in all other respects denying the Petitioner's motion. (R. 81: Memorandum, pp. 1-3; R. 82: Order, p. 1)

The Petitioner filed a Notice of Appeal on the 5th day of June, 1990, with respect to the orders entered on March 9, 1990 and May 8, 1990. (R. 83; Notice of Appeal, pp. 1-2). On May 2, 1991, the

Court of Appeals for the Sixth Circuit filed an opinion affirming the District Court's decision. The Petitioner seeks review by this Court of the Sixth Circuit Court of Appeals' decision.

ARGUMENT

INTRODUCTION

This case presents to this Court an opportunity to decide the extent a governmental agency may ignore the commands of Congress in performing it's duty. In the alternative, this case presents to this Court the opportunity to decide the power of a third party beneficiary to enforce the provisions of a contract between a governmental agency and a township. In his complaint, the Petitioner asserts four distinct ways in which the TVA has acted or failed to act which are subject to judicial review:

(1) It has failed to observe the clear congressional mandate that its power be resold at the lowest rates feasible for the benefit of rural and domestic consumers;

(2) It has failed to enforce the accounting provisions in the power contract between it and the Town of Greeneville, Tennessee, despite the fact that its agents were aware of the gross distortions in the accounting practices of the Greeneville Light and Power System;

(3) It entered into a new power contract with the Town of Greeneville, Tennessee, without addressing the violations of the FERC Uniform Accounting Guidelines or the accumulations

of Ten Million Dollars ($10,000,000.00) in reserves; and

(4) It failed to take action to reduce the rate levels at which ratepayers were charged for their electricity in violation of the Congressional mandate that power be resold at the lowest rates feasible.

(R. 30, Amended and Restated Complaint, pp. 13-15).

The Petitioner, individually and as proposed class representative, is seeking review of the TVA's action pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. Section 701 et. seq., which provides in pertinent part as follows:

> **Right of Review:** A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled

to judicial review thereof. . . .(Emphasis added).

The United States District Court and the Court of Appeals dismissed the Petitioner's action finding it to be nonreviewable agency action.

In addition to statutory review, the Petitioner is seeking specific performance and damages for breach of contract as a third party beneficiary to the power contract entered into by and between the GLPS and the TVA. The power contract provides specifically as follows:

> Purpose of Contract. It is hereby recognized and declared that, pursuant to the obligations imposed by the TVA Act, Municipality's operations of a municipal electric system and TVA's wholesale service thereto are primarily for the benefit of the consumers of electricity. Toward that end, Municipality agrees that the electric system shall be operated on a nonprofit basis, and that the electric system funds and accounts shall not be

> mingled with other funds or accounts of Municipality. . . . In accordance with these principals, which are mutually recognized as of the essence of this contract, Municipality agrees that the electric system shall be operated and the system's financial accounts and affairs shall be maintained in full and strict accordance with the provisions of this contract. (Emphasis added).

Thus the express language of the contract provides that he contract was created for the benefit of the individual consumers of electricity. As a preliminary matter, we will first discuss the standing of the Petitioner to bring this action.

A. The Petitioner has Standing for Review Under the TVA Act.

The Petitioner and members of the proposed class constitute persons "suffering legal wrong" or "adversely affected or aggrieved" because they have been charged excessive rates for their electricity, in violation of the express policies of the TVA Act. The Congres-

sional policy as delineated in 16 U.S.C. Section 831i provides as follows:

> This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and such manner as to encourage increased domestic and rural use of electricity. (Emphasis added).

Since the Petitioner is both a domestic and rural consumer of electricity, he is among those whose interests fall within the zone of interests to be protected under the TVA Act, and therefore satisfies the test to establish standing to bring this action. See, Apter v. Richardson, 510 F.2d 351 (7th Cir. 1975). The Sixth Circuit Court

of Appeals has made it abundantly clear that contractual interests as well as statutory interests, both of which are present in this case, are sufficient to create standing for judicial review under the Administrative Procedures Act. According to Gibson and Perin Co. v. City of Cincinnati, 480 F.2d 936, at 945 (6th Cir. 1973), "to have standing, Petitioners must establish that they have a legal interest to maintain the suit, that the right invaded . . . is a legal right, - - one of property, one arising out of contract, . . . or one founded on a statute that confers a privilege." Certainly the Petitioner, and members of the proposed class, have suffered legal wrong by virtue of the fact that they have been paying excessive power rates in violation of both the TVA Act and the power contract.

The purpose of the standing requirement of 5 U.S.C. Section 702 is to insure that the Petitioner has a sufficient personal stake to present the issue vigorously. Apter v. Richardson, supra. at 353. Certainly, the Petitioner is the most qualified to insure a vigorous presentation of the issues because he not only has a financial stake in seeing power rates lowered and excessive charges rebated, but has the knowledge which he gathered as comptroller of the Greeneville Light and Power System to insure that the issues are properly framed and presented.

B. The Petitioner has Standing As a Third Party Beneficiary of the Contract Between the GLPS and the TVA.

The Petitioner, as consumer of electricity of the GLPS, has standing as a third party beneficiary to seek both

specific enforcement and damages as a result of breach, by both parties, of the terms of the power contract between TVA and the Town of Greeneville. In addition, the Petitioner has alleged in the Amended and Restated Complaint that the Town has breached the contract by failing to abide by FERC Uniform System of Accounts, as required by the contract. (R. 30: Amended and Restated Complaint, pp. 11-12).

The Power Contract entered into by and between the Town and the TVA clearly indicates that it exists for the benefit of the consumers of electricity in Greene County, Tennessee, of which the Petitioner is a member. Since TVA is a party to the contract and a federal agency acting under federal law, federal common law governs the contract. Berberich v. United States, 5 Cl.Ct. 652 (1984), aff'd 770 F.2d 179 (Fed. Cir.

1985); United States v. Standard Oil Co. of Calif., 332 U.S. 301, 67 S.Ct. 1604 (1947); Clearfield Trust Co. v. United States, 318 U.S. 573, 63 S.Ct. 573 (1943). Under federal jurisprudence, "a third party beneficiary may have enforceable under a contract if the contract was made for his direct benefit." Holbrook v. Pitt, 643 F.2d 1261, 1270 (7th Cir. 1981). Tennessee law, if applicable, would support such a result. See, Tennessee Jurisprudence, "Contracts," Section 85, "Third-Party Beneficiaries."

I. The District Court erred in holding that the actions of the Tennessee Valley Authority are exempt from judicial review by the federal courts under the Administratrive Procedures Act, 5 U.S.C. Section 701 et seq., no matter how flagrantly that agency violated Congressional policy as set forth in the provisions of the Tennessee Valley Authority Act, 16 U.S.C. Section 831(j).

The Administrative Procedures Act provides for the review of agency decisions, unless Congress specifically provides otherwise or there are no legal standards or law for a court to use in reviewing agency action. 5 U.S.C. Section 701(a) provides as follows:

> (a) This chapter applies, according to the provisions thereof, except to the extent that-
>
> > (1) statutes preclude judicial review; or
> > (2) agency action is committed to agency discretion by law.

The TVA is an agency of the United States Government subject to judicial review under the Administrative Procedures Act. "Agency" is defined in 5 U.S.C. Section 701(b)(1) as follows:

> For purpose of this chapter--
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to

review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title four, or sections 1622, 1884, 1891-1902 and former section 1641(b)(2) of title 50 appendix.

Although no case could be found directly on point dealing with review of TVA decisions, federal jurisprudence makes it abundantly clear that government controlled corporations do constitute

agencies within the meaning of the above sections. In Elm v. National R. Passenger Corp., 732 F.2d 1250, cert. den. 469 U.S. 982, 83 L.Ed2d 322, 105 S.Ct. 387, the fifth circuit held that Amtrak was an agency under the Freedom of Information Act which has a definition of agency in 5 U.S.C. Section 552 & 552(a) which is substantially identical to the definition in the Administrative Procedures Act as set forth above. See, also, Wirtz, "TVA, the Courts, and Power Rates: A Study in Judicial Review," 49 Tenn. Law Rev. 709 at 727, in which the author, Richard Wirtz, a member of the Tennessee Valley Authority Board of Contract Appeals and a professor at the University of Tennessee Law School, clearly indicates that judicial review of TVA decisions and actions is altogether appropriate under the Administrative Procedures Act.

The TVA act itself does not preclude review nor do other statutory authority. See, Wirtz, "TVA, the Courts, and Power Rates: A Study in Judicial Review," 49 Tenn. L. Rev. 709, at 735. Section two above would appear on its face to bar review of TVA rate-making. The relevant inquiry, as stated by this Court, is whether there exists appropriate legal standards to review an agency decision in a meaningful way. See, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); Heckler v. Chaney, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). There exists ample law from the TVA Act itself to permit review.

In Heckler v. Volpe, 470 U.S. at 828-829, Chief Justice Rehnquist explained the difference between the above two subsections as follows:

> . . . The former applies when Congress has expressed an intent to preclude judicial review. The latter applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decision making to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in Section 706--if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion."
>
> 105 S.Ct. at 1655.

The Administrative Procedures Act grants to the federal courts the power to review the actions of TVA. The scope of review which the federal courts are obligated to exercise is clearly

delineated in 16 U.S.C. Section 706, which provides in relevant part as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> . . .
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

Several district court opinions state that TVA rate setting, and anything

pertaining thereto, is strictly not subject to judicial review. However, upon inspection of these cases, one can see that the court in question did in fact exercise review of the rates prior to stating that it was not reviewable. See, Wirtz, supra.

In Ferguson v. Electric Power Board of Chattanooga, Tenn., 378 F. Supp. 787, aff'd 511 F.2d 1403 (1974), the Court was confronted with a suit by a ratepayer attacking the 10% discount for early payment under Tennessee usury laws as well as the Federal Truth in Lending Act. The District court reviewed the action of the TVA to determine if there had been a violation of the purposes of the TVA Act, and concluded that there had not been. The Court opined:

> In the absence of a clear violation of the "purposes of this Act," the matter of rate setting under the Tennessee

> Valley Authority Act is not subject to judicial review. (citations omitted) The practice of billing electrical charges upon a net and gross rate basis, both within the TVA system and throughout the electrical power industry, predates both the original enactment and subsequent amendment of the TVA Act and cannot in any sense to be said to be in violation of the "purposes" of that Act. (Emphasis added).

378 F.Supp. at 789. The court dismissed only after deciding that no violation occurred because the actions of the TVA were clearly within the scope of the purpose of the Act, which is the standard of review delineated in the Administrative Procedures Act Section 706(1).

In the affidavit of Matthews filed in opposition to the various motions, he states that gross accounting distortions which resulted in the overstatement of expense, with a resulting understatement of income, had been an ongoing problem in

the Greeneville Light and Power System since the early 1980's. He delineates the concerns of the TVA field accountants, which they expressed throughout this time period, with respect to the improper accounting procedures, and has attached a copy of a TVA report recommending that the appropriate TVA enforcement section require a multiple rate level reduction in the rates charged by the Greeneville Light and Power System. He also indicates that the Greeneville Light and Power System had failed to abide by FERC uniform accounting standards as required by the TVA power contract at the command of Robert Lay, manager, and over Matthew's protests. He affirmatively states that because of these accounting distortions, income was understated and excess revenues accumulated to the end that rates were maintained at artificially

high levels. (R. 33, Affidavit of Matthews, pp. 1-16)

In paragraph 6 of the affidavit of Richard C. Crawford, Vice President of Transmission and Customer Services for TVA, which was filed by TVA in support of its motion for summary judgment, he concedes that both revenues and cash reserves are factors used by TVA in rate setting. He does not disclose the formula, method, or regulatory scheme by which these items are factored into rate calculation. Matthews has stated in his affidavit that he has attempted to obtain this information from TVA both prior to and after being terminated by Lay, but to no avail, and has precluded discovery of this matter by Order entered on March 3, 1989. (R. 33: Affidavit of Matthews, pp. 2-3; R. 12: Affidavit of Crawford, p. 4; R. 27: Order, pp. 1-3).

In his affidavit, Matthews states that he was advised by agents of TVA that the reason TVA delayed enforcement action was because Lay was the president of an organization of TVA distributors, and not because enforcement action was not necessary. (R. 33: Affidavit of Matthews, pp. 14-15) The United States District Court has precluded the Petitioner from discovering other reasons for the delay in enforcement action by the Order entered on the 3rd day of March, 1989, quashing the subpoenas for the scheduled depositions of TVA personnel. (R. 27: Order, p. 2)

TVA could have forced a rate reduction until reserves are drawn down to reasonable levels. In such areas where there are multiple enforcement actions possible, the federal courts exercising judicial review have issued a

writ of mandamus to compel action, leaving the matter of deciding the most appropriate action to take in the sound discretion of the agency. See, Las Vegas Hawaiian Development Co. v. Securities and Exchange Comm., 466 F. Supp. 928 (D. C. Hawaii, 1979). However, this Court should not fail to act just because certain matters are committed to TVA discretion, because a Congressional grant of administrative discretion to TVA or any agency should not become a license for lethargy. Poirrier v. St. James Parrish Police Jury, 372 F. Supp. 1021 (E. D. La. 1974), aff'd 531 F.2d 316 (5th Cir.), reh. denied 537 F.2d 840.

A federal court has exercised judicial review over contract enforcement actions involving the TVA in Crass v. Tennessee Valley Authority, 460 F. Supp. 941 (E. D. Tenn. 1978), aff'd 627 F.2d 1089. In that case, TVA acted

affirmatively, and the standard for review was whether there was substantial evidence to support the action and whether the agency acted arbitrarily or capriciously. In other cases involving TVA, the federal courts have reviewed contract provisions to determine if they were arbitrary or capricious or constituted an abuse of discretion when scrutinized under the purposes of the TVA Act. See Wirtz, supra, at 719-722.

Further, in Heckler v. Chaney, 470 U.S. 821, 109 S. Ct. 1649, 470 L.Ed.2d 714 (1985). In that case, the United States Supreme Court held:

> (The decision of an agency not to take enforcement action) has traditionally been "committed to agency discretion," and we believe that the Congress in enacting the APA did not intend to alter that tradition. (citations omitted) . . . In so stating, we emphasize that the decision is only presumptively nonreviewable; the presumption may be rebutted where the substantive statute

> has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. (Emphasis and parentheticals added.)
>
> 470 U.S. at 832-833

This case presents a case wherein the presumption of nonviewability has been rebutted.

II. Regardless of whether the Tennessee Valley Authority is exempt from administrative review, a ratepayer does have standing to pursue a cause of action for breach of the power contract between the Tennessee Valley Authority and the Town as the third party beneficiary of the contract.

The express language of the contract provides that the contract was created for the benefit of the individual consumers of electricity, that both TVA and the Town recognize that this is the very essence of the contract, and that if

there are excess revenues, as alleged in this case, that there shall be a reduction in rates. Moreover, this obligation is imposed upon TVA as well as the Town. Consequently, it is clear that the parties to the contract intended it to be for the benefit of the ratepayers of the GLPS. Paragraph 6 of said agreement governing use of revenues provides, in part, as follows:

> . . . provided, however, that resale rates and charges **shall** be reduced from time to time to the **lowest practicable levels** considering such factors as future circumstances affecting the probable level of earnings, the need or desirability of financing a reasonable share of new construction from such surplus revenues, and fluctuations in debt service requirements. (Emphasis added)

A breach of this provision occurred as evidenced by the Ten Million Dollars ($10,000,000.00) in reserves. The Petitioner and the proposed class are

entitled to the enforcement of a contract in which they are specifically recognized as beneficiaries.

Under well established principles of law, third party beneficiaries are entitled to recover damages for breach of contract. See, e.g., Norfolk and Western Co. v. United States, 641 F.2d 1201 (6th Cir. 1980). In addition, a third party beneficiary may obtain the same forms of judicial relief as a promisee under the contract, such as declaratory judgments, Holbrook v. Pitt, 643 F.2d 1261, injunctive relief, Dillon v. AFBIC Development Corp., 420 F. Supp. 572 (D.C. Ala. 1976) aff'd in part, rev'd in part, 597 F.2d 556, and specific performance, Bosser Parish School Board v. Lemon, 370 F.2d 847. Therefore, the Petitioner and members of the class are entitled to all of the relief sought as third party beneficiaries, independently of any

request for the exercise of judicial review as outlined and argued in Section I of this brief.

III. Even in the absence of the Tennessee Valley Authority as a party, the United States District Court does have federal question jurisdiction over the remaining parties under 28 U.S.C. Section 1331 based upon the inherent questions of federal law involved in the interpretation, construction, and application of the FERC's Uniform System of Accounts as published in the Code of Federal Regulations at 18 C.F.R. Section 101, et seq.

Assuming arguendo, that it was appropriate for the District Court to dismiss TVA from this case, there are still substantial federal questions upon which jurisdiction can be predicated pursuant to 28 U.S.C. Section 1331.

Federal case law has made it abundantly clear that federal question jurisdiction exists where a substantial question of federal law is a necessary element of a state cause of action, even

where the claim itself is not created by federal law. See Christopher v. Cavallo, 662 F. 2d 1082 (4th Cir. 1981; Federal jurisdiction exercised over state breach of warranty claim because interpretation and application of the federal Copyright Act, 28 U.S.C.A. Section 1338(a) was required); Kinsey v. Nestor Exploration Ltd., 604 F. Supp. 1365 (E.D. Wash. 1985); Cf. Banco De Ponce v. Hinsdale Supermarket Corp., 663 F. Supp. 813 at 817 (E.D.N.Y. 1987). Held that there was no jurisdiction in this case because there was no substantial federal question.

Reported decisions of the federal courts also clearly indicate that when a case, such as the one at bar, requires the interpretation, construction, and application of federal regulations, then federal courts have jurisdiction under 28 U.S.C. Section 1331. In Murphy v.

Colonial Federal Savings and Loan Association, 388 F.2d 609 at 611 (2nd Cir. 1967), the Second Circuit Court of Appeals was confronted with an action brought by disgruntled stockholders in a federal savings and loan association after management refused to provide them with a stockholders list. Pursuant to 12 U.S.C. Section 1464(a), the Federal Home Loan Bank Board adopted certain regulations to govern the organization of federal savings and loan associations. One of those, 12 C.F.R. Section 544.1(4), provided that a stockholder could vote in person or by proxy. The question posed in that litigation was whether there was a duty under that regulation to disclose the names and addresses of other stockholders, a matter which would normally be decided under state corporation law. However, the Second Circuit found under those facts that

there was a substantial question of federal law arising from the interpretation and application of the federal regulation even though the claim itself arose out of state law. 388 F.2d at 611.

Similarly, in Confederated Housing Associates, Inc. v. Department of Housing and Urban Development, 538 F. Supp. 1158 (E. D. Ark. 1982), the district court held that it could exercise jurisdiction under 28 U.S.C. Section 1331 where there was a substantial question of federal law arising from the interpretation and application of federal administrative regulations. In reaching its conclusion, the court stated:

> The reference in section 1331 to 'laws . . . of the United States' means that there is jurisdiction of a claim arising under an . . . administrative regulation . . . ." Wright, Miller, and Cooper, Federal Practice and Procedure, Jurisdiction, Section 3563, Farmer v. Philadelphia Electric

> Co., 329 F.2d 3 (3rd Cir. 1964). Therefore "(i)t is beyond dispute that validly issued administrative regulations . . . may be treated as 'laws of the United States' under Section 1331(a)." (Citations omitted)
>
> . . .
>
> In the instant case, we are concerned with the enforcement of validly enacted administrative regulations, promulgated with the intent of ensuring that a specific class of persons (private developers) is not subjected to inequitable procedures when participation in federally funded projects is attempted.

538 F. Supp. at 1162-1163.

Therefore, federal jurisprudence establishes that federal regulations may provide a basis for federal question jurisdiction even where the claim is predicated upon a state law cause of action.

IV. The United States District Court erred in granting the Respondent's motions for Summary judgment when it had previously thwarted the Petitioner's effort to take discovery depositions to develop the proof necessary to establish the contested issues of fact essential to withstand the motions for summary judgment.

The Petitioner sought to develop crucial testimony by deposing Freddie R. Horne, Richard C. Crawford, and Latain McGhee. Specifically, the Petitioner sought to discover the criteria, formula, or regulations by which the TVA calculates suggested rates for its utilities for contract negotiations. (R. 16: Notice of Depositions, p. 2) These facts were essential to counter the motions for summary judgment, because with them, the Petitioner could demonstrate that the District Court could grant relief in the instant case without changing or modifying the rate setting process of the TVA or its rate schedules.

The Petitioner had tried to obtain this information while he was controller of the GLPS, but was unable to do so since the information was exclusively within the knowledge of the agents of the TVA and they refused to reveal it, as set forth in the affidavit of Matthews. (R. 33: Affidavit of Matthews, p. 3) However, the District Court denied the Petitioner the right to depose the key witnesses with this information. (R. 27: Order, p. 2) The Court then later granted the Respondents' motions for summary judgment. (R. 75: Order, p. 1)

Under clear principles of federal law, the Petitioner was entitled to be given a reasonable opportunity to complete the record before the Court ruled on the motions for summary judgment. See Lockhart v. Hoensteine, 411 F.2d 455 (3rd Cir. 1969); Cert. Den. 396 U.S. 941, 234 L.Ed.2d 244, 90 S.Ct.

378. This is particularly the case where the information is exclusively within the knowledge of the agents of one of the adverse parties, as in the instant case. In such cases, the federal courts have universally considered this factor as giving the party opposing the motion for summary judgment a peculiar right to insist upon a continuance for orderly discovery and development of the facts. See Slagle v. United States, 228 F.2d 673 (5th Cir. 1956). Indeed, Rule 56(f) of the Federal Rules of Civil Procedures provides for this situation as follows:

> (f) **When Affidavits are Unavailable:** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to

be had or may make such other order as is just.

Therefore, it is clear that the District Court erred in precluding the Petitioner from developing his case through discovery and then granting the Respondents' motions for summary judgment.

CONCLUSION

For the foregoing reasons, the Petitioner, Phillip Matthews, requests this Court to grant his Petition for Writ of Certiorari as there are important federal questions that this court should decide.

Respectfully Submitted,

Bob McD. Green
204 East Unaka Avenue
Johnson City, TN 37601
(615) 929-7169
Counsel of Record

John T. Milburn Rogers
100 South Main Street
Greeneville, TN 37743
(615) 639-5183
Of Counsel

Kenneth Clark Hood
100 South Main Street
Greeneville, TN 37743
(615) 639-5183
Of Counsel

Debra A. Wall
100 South Main Street
Greeneville, TN 37743
(615) 639-5183
Of Counsel

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

PHILLIP MATTHEWS,

Petitioner,

v.

GREENEVILLE LIGHT AND POWER
SYSTEM, ET. AL.,

Respondent.

WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

APPENDIX

Bob McD. Green
204 East Unaka Avenue
Johnson City, TN 37601
(615) 928-6551
Counsel of Record

John T. Milburn Rogers
Kenneth C. Hood
Debra A. Wall
100 South Main Street
Greeneville, TN 37743
(615) 639-5183
Of Counsel

TABLE OF CONTENTS

	PAGE
Order	A-ii
Memorandum	A-iii
Order	A-xviii
Memorandum	A-xx

APPENDIX
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

PHILLIP MATTHEWS, Individually and as Class Representative,	)	
Plaintiff,	)	
v.	)	CIV-2-88-469
GREENEVILLE LIGHT & POWER SYSTEM, ET AL.,	)	
Defendants.	)	

O R D E R

For the reasons set forth in the accompanying memorandum, defendant TVA's motions to dismiss or, alternatively, for summary judgment (Court File No. 10, 50), are hereby GRANTED.

This case is hereby DISMISSED WITH PREJUDICE as to all defendants, with each party to bear their own costs.

ENTER.

s/R. Allan Edgar

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

PHILLIP MATTHEWS, Individually and as Class Representative,	)	
Plaintiff,	)	
v.	)	CIV-2-88-469
GREENEVILLE LIGHT & POWER SYSTEM, ET AL.,	)	
Defendants.	)	

M E M O R A N D U M

Before the Court are the motions to dismiss by defendant Lay (Court File Nos. 7, 43), and the motions to dismiss or, alternatively, for summary judgment by defendants Town of Greeneville ("Greeneville"), Worley, Musick, Hite, Bullen and Williamson (Court File No. 46) and defendant Tennessee Valley Authority ("TVA") (Court File Nos. 10, 50). All of

the above motions will be treated as motions for summary judgment pursuant to Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(c). For the reasons which follow, TVA's motions will be GRANTED, and the remaining claims will be DISMISSED.

I. BACKGROUND

Plaintiff seeks to bring this class action suit to recover $10 Million which was allegedly collected by the Greeneville Light & Power System ("GL&PS") through excess utility rates. Plaintiff alleges that TVA and Greeneville entered into a contract for the purpose of providing electrical power to GL&PS. GL&PS, pursuant to the contract, was to maintain its financial records according to the Federal Energy Regulatory Commission Uniform System of

Accounts ("FERC"). Because of its failure to do so, allegedly under defendant Lay's orders, GL&PS charged its customers several rate levels higher than it could have had it complied with the FERC accounting guidelines. TVA allegedly was under a contractual duty to the proposed plaintiff class to force GL&PS to comply with these guidelines. Through its failure to do so, TVA allegedly contributed to the inflated rates charged.

Plaintiff now seeks to bring a class action to recovery both the alleged overcharges and a writ of mandamus against the defendants to force compliance with the FERC guidelines in the future. Recovery is based upon not only the claims against TVA which supply federal question jurisdiction, but state law claims against the remaining

defendants for breach of contract, tortious breach of contract, and misfeasance in office.

II. **DISCUSSION**

A motion for summary judgment shall be granted if, based on the record as a whole, there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party "bears the burden of clearly and convincingly establishing the non-existence of any genuine issue of material fact, and the evidence as well as the inferences drawn therefrom must be read in the light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986.)

However, "[o]nce the moving party presents sufficient evidence to support the motion under Rule 56(c), . . . [t]he nonmoving party is not entitled to a trial merely on the basis of allegations; significant probative evidence must be presented to support the complaint." Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986) (emphasis supplied). Only factual disputes whose resolution "might affect the outcome of the suit" are "material" and preclude the entry of summary judgment. 60 Ivy Street Corp. v. Alexander, 822 F.2d 14532, 1435 (6th Cir. 1987). If, after reviewing the evidence, it appears that no such genuine issue of fact exists, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Plaintiff seeks judicial review of TVA's decision not to enforce the FERC accounting guidelines provision of the contract with Greeneville. According to the plaintiff, TVA's failure to ensure compliance by GL&PS to FERC guidelines resulted in higher rates paid by consumers. TVA contends its actions taken pursuant to congressional authority specifically delegated to it under the TVA act, 16 U.S.C. Subsection 831 et seq., were within that authority and, therefore, are not judicially reviewable. The Court must first determine whether TVA's action relative to the contract with Greeneville is judicially reviewable.

TVA is an instrumentality of the United States, performing wholly governmental services. PRI Pipe Supports

v. Tennessee Valley Authority, 494 F.Supp. 974, 975 (N.D. Miss. 1980).

> Since TVA is an agency of the federal government, the actions it takes pursuant to its statutory grant of authority are administrative in nature. Determination of whether such action is reviewable is governed by the general rules applied by courts in determining whether administrative agency action is reviewable.

Gold Point Marina, Inc. v. Tennessee Valley Authority, 635 F.Supp. 39, 42 (E.D. Tenn. 1986).

The Administrative Procedure Act ("APA"), 5 U.S.C. Subsection 501 et seq. (1977), governs the extent to which TVA's decision not to enforce the contractual provision is subject to judicial review. Standing to seek review is set forth in 5 U.S.C. Section 702 (1977) as: "A[ny] person . . . adversely affected to aggrieved by agency action [including a

failure to act] . . . is entitled to judicial review thereof." The standards applied on review are set forth in 5 U.S.C. Section 706 (1977). However, a person seeking review must first overcome the obstacles in section 701(a) which states:

> (a) [Judicial review] applies, according to the provisions thereof, except to the extent that --
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the Supreme Court determined that the Secretary of Transportation's approval of an interstate highway through Overton Park in Memphis, Tennessee, was reviewable. In doing so, however, the

Court recognized that section 701(a)(2) provided an exception to judicial review of agency action where "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Id. at 410 (quoting S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). The Supreme Court in Heckler v. Chaney, 470 U.S. 821 (1985), subsequently elaborated on this exception, when it said:

> even where Congress has not affirmatively precluded review, review is not to be had if the statute is draw so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decision making to the agency's judgment absolutely.

Id. at 830.

Just as in Heckler, the present suit involves an agency's refusal to take

requested enforcement action. Id. at 831. In such a situation, the agency has absolute discretion to decide not to prosecute or enforce. Id. This presumption of unreviewability "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Id. at 833. In Heckler, the relevant "authorized" the Secretary of Health and Human Services to conduct investigations and examinations. 21 U.S.C. Section 372 (1972). The Court held that the enforcement provisions of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. Section 301 et seq. (1972), committed "complete discretion to the Secretary to decide how and when they should be exercised." Id. at 835.

Section 10 of the TVA Act, 16 U.S.C. Section 831i (1985), provides in relevant part:

> . . . Provided further, that the Board is authorized to include in any contract for the sale of power such terms and conditions . . . and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter. . . .

(Emphasis supplied). There is no statutory language requiring TVA to enforce any electric power contract in any particular way. Just as the Secretary in Heckler, the TVA Board balanced a number of factors peculiarly within its expertise in deciding not to enforce the FERC guidelines requirements. (Court File Nos. 11, 12) The plaintiff has failed to establish that Congress did not commit to TVA's discretion the

refusal to institute enforcement proceedings.

Even if the plaintiff could overcome the hurdle of section 701(a)(2), the scope of judicial review requested by the plaintiff would involve a review of TVA's resale rate schedules for the sale of power by its distributors. Congress vested that discretion in TVA by an express statutory grant which is not subject to judicial review. 16 U.S.C. Section 831i (1985). See Dean v. Herrington, 668 F.Supp 646, 650 (E.D. Tenn. 1987); Consolidated Aluminum Corp. v. Tennessee Valley Authority, 462 F.Supp 464, 474 (M.D. Tenn. 1978); Allen v. Electric Power Bd. of the Metropolitan Gov't, 422 F.Supp. 4, 6 (M.D. Tenn. 1976); Mobil Oil Corp. v. Tennessee Valley Authority, 387 F.Supp. 498, 506 (N.D. Ala. 1974). Plaintiff's complaint

seeks redress for the GL&PS consumers' injury: Payment of higher electric bills because of the higher rate levels caused by TVA's failure to enforce FERC guidelines. To grant such relief, this Court would have to determine if the rate levels were too high and, if so, by how much. Such judicial review is impermissible.

Plaintiff has predicated subject matter jurisdiction on 28 U.S.C. Section 1331. However, absent TVA's presence, the plaintiff's remaining claims are all based upon state law. These include breach of contract, tortious breach of contract and misfeasance in office. In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Supreme Court stated:

> Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Id. at 726 (footnote omitted). However, the Court later tempered this view in Rosado v. Wyman, 397 U.S. 397 (1970) stating:

> We are not willing to defeat the common sense policy of pendent jurisdiction -- the conservation of judicial energy and the avoidance of multiplicity of litigation -- by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.

Id. at 405

In this circuit, trial courts may exercise only "minimal discretion" in deciding whether to exercise pendent jurisdiction over a state law claim once the federal claims have been dismissed. See Province v. Cleveland Press Publishing Co., 787 F.2d 1047, 1055 (6th Cir. 1986); Service, Hospital, Nursing Home and Public Employees Union, Local

No. 47 v. Commercial Property Services, Inc., 755 F.2d 499, 506 n. 9 (6th Cir.), cert. denied, 474 U.S. 850 (1985). Only in cases of "overwhelming interests in judicial economy" may a district court retain jurisdiction." Providence, 787 F.2d at 1055. In the present case, the Court stayed discovery early in the litigation (Court File No. 27); consequently, judicial economy is not substantially served by proceeding solely upon the statute law claims. The Court will, therefore, DISMISS these claims for lack of an independent basis for jurisdiction.

For the preceding reasons, summary judgment will be GRANTED in favor of TVA and the remaining pendent state law claims will be DISMISSED. An order will enter.

s/R. Allan Edgar

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

PHILLIP MATTHEWS, Individually and as Class Representative,	)	
Plaintiff,	)	
v.	)	CIV-2-88-469
GREENEVILLE LIGHT & POWER SYSTEM, ET AL.,	)	
Defendants.	)	

O R D E R

For the reasons set forth in the accompanying memorandum, the plaintiff's motion to alter or amend or reconsider judgment (Court File No. 78) is GRANTED IN PART and DENIED IN PART. The motion is hereby GRANTED to reflect that the Court's order filed March 9, 1990 is hereby amended to DISMISS WITHOUT PREJUDICE the plaintiff's pendent state

law claims. The motion is DENIED as to all other grounds.

s/R. Allan Edgar
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

PHILLIP MATTHEWS, Individually and as Class Representative,	)	
Plaintiff,	)	
v.	)	CIV-2-88-469
GREENEVILLE LIGHT & POWER SYSTEM, ET AL.,	)	
Defendants.	)	

M E M O R A N D U M

This case is before the Court upon plaintiff's motion (Court File No. 76) to alter or amend judgment or to reconsider the Court's order filed March 9, 1990 (Court File No. 75) granting the motion of defendant Tennessee Valley Authority ("TVA") to dismiss or for summary judgment and dismissing this case as to all defendants.

Plaintiff asserts three different grounds for amending that order:

(1) This Court can exercise judicial review in this matter based upon the plaintiff's status as a third-party beneficiary of the power contract between defendant TVA and defendant Town of Greeneville;

(2) Even in the absence of defendant TVA, this Court may exercise federal question jurisdiction since the plaintiff's breach of contract claim involves the interpretation and application of the Uniform System of Accounts promulgated by the Federal Energy Regulatory Commission, a substantial question of federal law; and

(3) Since this Court dismissed the pendent state claims for lack of an independent basis for

jurisdiction, such dismissal should have been without prejudice.

As for the first ground for relief asserted by the plaintiff, even assuming that the plaintiff had standing to pursue a claim against TVA by virtue of his position as a third-party beneficiary to the power contract, as set forth in the Court's memorandum filed March 9, 1990 (Court File No. 74), pages 3 to 7, this Court may not review TVA's actions in this matter, whether the plaintiff proceeds under the Administrative Procedures Act, 5 U.S.C. Section 501 et seq. (1977), or as a third-party beneficiary.

As for the plaintiff's second ground for relief, even though the power contract between TVA and the Town of Greeneville incorporates regulations promulgated by the Federal Energy

Regulatory Commission, the plaintiff's claim remains essentially a breach of contract action grounded in state law.

Lastly, the plaintiff is correct in noting that the pendent state claims which this Court dismissed for lack of an independent basis for jurisdiction should have been dismissed without prejudice. Knafel v. Pepsi-Cola Bottlers of Akron, Inc., Nos. 89-3208/89-3209, slip op. at 18 (6th Cir. March 27, 1990); Cowan v. University of Louisville School of Medicine, No. 89-5677, slip op. at 15 (6th Cir. April 10, 1990); Heussner v. National Gypsum Company, 887 F.2d 672, 677 (6th Cir. 1989).

An order will enter.

s/R. Allan Edgar
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILLIP MATTHEWS, Individually and as Class Representative,	)	
Plaintiff-Petitioner,	)	ON APPEAL FROM
v.	)	THE UNITED STATES
TOWN OF GREENEVILLE, ET. AL.,	)	DISTRICT COURT FOR THE EASTERN
Defendants-Respondents.	)	DISTRICT OF TENNESSEE

BEFORE: **KENNEDY** and **JONES**, Circuit Judges; and **CHURCHILL**, Senior District Judge

JONES, Circuit Judge. Plaintiff-appellant Phillip Matthews brought this class action suit in order to recovery alleged overcharges collected by the Greeneville Light and Power System (GLPS). Defendant-appellee Tennessee Valley Authority (TVA) produces and sells electricity at wholesale rates to 160 cities and cooperative distributors.

Matthews charges the TVA with failure to force the GLPS to maintain its accounts in compliance with the Federal Energy Regulatory System (FERC) Uniform System of Accounts. Matthews argues that the improper accounting procedures used by GLPS result in ratepayers being overcharged. The requested relief included a writ of mandamus compelling TVA to ensure that GLPS and the other defendants abide by FERC accounting procedures. Matthews also sought damages of $10,000,000.00, the amount which Matthews claimed ratepayers had been overcharged as a result of the improper accounting procedures.

The district court granted TVA's motion for summary judgment, and dismissed the claims against the remaining defendants without prejudice. For the following reasons, we affirm:

I

TVA has supplied Greeneville, Tennessee with power since 1945. The congressional policy regarding the sale of electricity by the TVA to municipalities like Greeneville is to "permit domestic and rural use at the lowest possible rates[.]" 16 U.S.C. Section 831(j) (1988). The TVA Board is authorized to specify the rates at which TVA-supplied power may be charged to the consumer by municipalities. 16 U.S.C. Section 831i (1988). Tennessee statutory law empowers municipalities to contract with TVA for electrical power. Tenn. Code Ann. Section 7-52-201 (1985).

The obligation of GLPS to apply FERC accounting guidelines does not arise from federal law, but from the contract between TVA and GLPS which sets the terms

under which TVA provides electricity to the GLPS. In its Schedule of Terms and Conditions, the contract provides that

> **Municipality shall keep the general books of accounts of the electric system according to the Federal Energy Regulatory Commission Uniform System of Accounts.**

Other pertinent provision of the contract provide that

> **[1] Municipality's operations of a municipal electric system and TVA's wholesale service thereto are primarily for the benefit of the consumers of electricity.**
>
> *******
>
> **[5(c)] If the rates and charges in effect at any time provide revenues that are more than sufficient for such purposes . . . Board and TVA shall agree upon a reduction in said rates and charges, and Municipality shall promptly put such reduced rates and charges into effect.**
>
> *******
>
> **[6(b)] [R]esale rates and charges shall be reduced from time to time to the lowest practicable levels[.]**

On November 10, 1988, Matthews filed this suit against the GLPS, TVA, and

Robert Lay, manager of GLPS.[1] Jurisdiction was based on 28 U.S.C. Section 1331, which accords district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The only federal issue raised in Matthews' complaint is the claim against TVA. The state law claims were considered by the district court through the exercise of pendent jurisdiction.

Following the defendants' motion to dismiss or, in the alternative, for summary judgment, Matthews made an effort to depose several TVA employees. The defendants, however, filed motions for

---

[1]On March 24, 1989, Matthews filed an Amended and REstated Complaint. J. App. at 17-39. The amended complaint dropped GLPS as a defendant, but added as defendants the Town of Greeneville and several members of the Greeneville Board of Public Utilities.

protective orders to stay discovery. A Magistrate granted the motions in March 1989.

In evaluating TVA's motion for summary judgment, the district court first considered whether TVA's failure to act was subject to judicial review under the Administrative Procedure Act (APA). Under Section 701(a) of the APA, agency actions are judicially reviewable unless "[the] agency action is committed to agency discretion by law." 5 U.S.C. Section 701(a)(2) (1988). The district court found there was no specific statutory mandate requiring TVA to enforce the electric power contract between itself and GLPS. Thus, the Court concluded that Matthews "failed to establish that Congress did not commit to TVA's discretion the refusal to institute enforcement proceedings." In any event,

the court found that 16 U.S.C. Section *31i vests TVA with absolute discretion, without judicial review, to decline enforcement of the contractual provision at issue.[2] Once TVA was dismissed, federal question jurisdiction no longer existed. As a result, the court dismissed without prejudice the remaining pendent state law claims based on breach of contract, tortuous breach of contract, and misfeasance in office. J. App. at 90.

II

---

[2]Section 831i provides in pertinent part:

> [T]he Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purpose of this chapter[.]

A long line of precedent exists establishing that TVA rates are not judicially reviewable. See. e.g., Carborundum Co. v. Tennessee Valley Authority, 521 F. Supp. 590, 593 (E.D. Tenn. 1981) (referring to "the well established legal principal that the setting of power rates under the Tennessee Valley Authority Act is not subject to judicial review."). Matthews contends that the TVA rate cases are not germane because the gravamen of his complaint concerns the TVA's failure to enforce its contract with GLPS.[3]

---

[3]Matthews based a good deal of his argument on a law review article arguing that the nonreviewability of TVA power rate determinations is a "relic of the agency's initial period of crisis." Wirtz, TVA, the Courts, and Power Rates: A study in Judicial Review, 49 Tenn. L.R. 709, 739 (1982) (appended to Matthews' brief). In the article, Professor Wirtz concedes the lack of judicial authority for his position, but nevertheless makes a cogent argument for why TVA rates

Matthews alleges that due to TVA's failure to enforce the contract,[4] he and the members of the proposed class have been paying excessive power rates in violation of the contract between Greeneville and TVA and the intent of Congress as expressed in 16 U.S.C. Section 831j, supra. Section 831j and the contract both provide that TVA-

---

should be subject to judicial review.

[4]Matthews states that he has evidence that agency inaction violated the congressional mandate concerning low rates and that this inaction resulted in GLPS reserves of over $10,000,000.00. Much of this evidence is contained in Matthews' own affidavit and focuses on his twelve hears as controller for GLPS. The allegations in the affidavit focus on violations of FERC accounting procedures, specifically, the failure to capitalize certain labor expenses. As a result, net income was underestimated and property taxes paid by GLPS were lower. Because net income is taken into account by TVA in setting rate schedules, Matthews concludes that the accounting violations resulted in higher rates for electricity consumers.

supplied energy is to be furnished to consumers at the lowest possible rates.

Matthews' complaint against TVA must be evaluated under the provisions of the Administrative Procedure Act (APA). Matthews argues that he has standing to challenge TVA actions under section 702 of the APA, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statue, is entitled to judicial review thereof[.]" 5 U.S.C. Section 702 (1988) (emphasis added). Section 702, which matthews relies on, is addressed specifically to persons adversely affected by "agency action."

Matthews claim, however, does not involve agency action, but rather, agency inaction: TVA's failure to ensure compliance with FERC guidelines. Under

Heckler v. Chaney, 470 U.S. 821, 832 (1985), an agency's decision not to take action is "presumptively unreviewable." The import of Heckler v. Chaney was that it interpreted section 701(a)(2), which provides that actions "committed to agency discretion by law" are not judicially reviewable, to include agency refusals to act. Id. at 838. See generally Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410-13 (1971) (explaining scope of "committed to agency discretion" exception).

In Heckler, prison inmates sentenced to death by lethal injection of certain drugs requested the Food and Drug Administration (FDA) to approve the drugs as "safe and effective" for human execution. The FDA had approved the drugs for other medical purposes. Id. at 823. The unanimous Court rejected the

inmates argument that the FDA's failure to take enforcement action was reviewable under the APA. The Court found agency inaction to be generally unsuitable for judicial review because: (1) an agency's decision not to take enforcement action involves factors within the agency's peculiar area of expertise; (2) a refusal to act does not usually involve an exercise of coercive authority over an individuals' constitutional rights; and (3) the refusal to take action has traditionally been regarded as "the special province of the Executive Branch." Id. at 831-32.

Heckler v. Chaney provides that under certain circumstances the presumption of unreviewability may be overcome. The Court stated that:

> [T]he presumption may be rebutted where the substantive statute has provided guidelines for the agency

> to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congres did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.

Heckler, 470 U.S. at 832-33.

As an example of an instance where the presumption of unreviewability was overcome because Congress provided adequate guidelines for the agency to follow, the Court in Chaney discussed the Labor-Management Reporting and Disclosure Act ("the Act"). The Act provided that when a union member filed a complaint, "[t]he Secretary of Labor shall investigate . . . and he shall . . . bring a civil claim [if probable cause exists]."' 470 U.S. at 833 (discussing Dunlop v. Bachowski, 421 U.S. 560 (1975)). The Secretary's decision not to take action in a specific instance was

judicially reviewable because the Act required the Secretary to file suit if certain "'clearly defined"' factors were present. Id. at 834. The Act "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." Id.

Matthews believes that the TVA Act, 16 U.S.C. Sections 831i, 831n-4(f), stating that TVA power be supplied at the lowest cost possible, provides adequate law to apply. He also relies on TVA's contractual obligations to reduce rates in the fact of surplus revenues. Paragraph 5(c) of the contract provides that rates "shall" be reduced if the rates in effect "provide revenues that are more than sufficient for such purposes." Matthews surmises that $10,000,000.00 in reserve is "more than sufficient", and that TVA's failure to

enforce the contract was arbitrary and capricious.

We recognize that under Heckler v. Chaney the unreviewability of an agency's failure to act is merely a presumption which may be rebutted if "the substantive statute" provides the agency with adequate guidelines. 470 U.S. at 832-22. The substantive statute in this case is the TVA Act, and not the contract between TVA and the GLPS. As a result, Matthews' argument that the contract provides "law to apply" is without merit. With respect to the TVA Act, the only guidelines established are that TVA sales of electricity to municipalities should "permit domestic and rural use at the lowest possible rates." 16 U.S.C. Section 831j (1988). There is no language requiring the TVA to take action if a provision in one of its contracts is

not followed. The TVA Act does not even require action by the TVA is there is evidence that electricity is not being provided at the lowest possible rates to consumers. On the contrary, the TVA Act accords the TVA a great amount of discretion in its contractual relations with municipalities.

Under these circumstances, a vague admonition to maintain "the lowest possible rates" does not come close to providing the sort of guidelines which would permit meaningful judicial review. Thus, not only is TVA's decision to require adherence to FERC guidelines in the GLPS contract committed to agency discretion, but the enforcement of that obligation is completely with TVA's discretion as well.

We realize that our decision effectively leaves Matthews with no

alternative but to pursue a legislative remedy. The federal court system, however, cannot assume the role of a (quasi) public service commission for TVA ratepayers. The broad grant of authority Congress has afforded the TVA in the TVA Act precludes judicial review in this instance. We find that TVA's failure to force GLPS to utilize FERC standards is unreviewable, and that the district court correctly granted summary judgment in favor of TVA.

III

Both Matthews and the remaining defendants have appealed the district court's dismissal without prejudice of the claims based on state law. Matthews would have this court reverse the dismissal to allow the merits of the

state claim to be addressed. The defendants argue for a dismissal with prejudice. We find, however, that the district court did not abuse its discretion in dismissing the state law claims without prejudice.

Once the district court concluded that jurisdiction could not be exercised over Matthews' claim against TVA, it retained jurisdiction over the state law claims through pendent jurisdiction. "The decision whether to exercise pendent jurisdiction [over remaining state law claims] is generally left to the discretion of the trial court." Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1009 (6th Cir. 1987). A district court may decide to retain jurisdiction if compelled to by fairness concerns or "overwhelming interests in judicial economy." Province v. Cleveland Press

Pub. Co., 787 F.2d 1047, 1055 (6th Cir. 1986). In this case, we cannot discern either an "overwhelming interest in judicial economy", or fairness issue, which would compel a reversal of the district court's dismissal of the pendent state law claims.[5]

---

[5]In light of our conclusions that the TVA's decision not to enforce the contract is committed to agency discretion, and that the state claims were correctly dismissed without prejudice, we find it unnecessary to address the issues relating to the efficacy of the mandamus remedy, discovery, and third party standing.

We also reject Matthews' argument that, after the dismissal of TVA, the district court retained federal question jurisdiction over the remaining defendants under 28 U.S.C. Section 1331 because this cas "arises under" the FERC Uniform System of Accounts. The basis rule in this area is that "a suit arises under the law that creates the cause of action." American Well Works v. Layne & Bowler Co, 241 U.S. 257, 260 (1916). In this case, we cannot conclude that the FERC accounting guidelines create any cause of action. Instead, this case involves the interpretation of a contract which invoked federal accounting standards. It is well settled that "the mere presence of a federal issues in a

state cause of action does not automatically confer federal-question jurisdiction." Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 813 (1986).

IV

The district court's grant of summary judgment in favor of TVA, and the dismissal without prejudice of the pendent state law claims, is AFFIRMED.

CBD/pbd/45/20

(2)

No. 91-216

Supreme Court, U.S.
FILED
OCT 11 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

PHILLIP MATTHEWS, ETC.,

Petitioner,

vs.

THE TOWN OF GREENEVILLE, TENNESSEE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS, THE TOWN OF GREENEVILLE, TENNESSEE, NORMAN WILLIAMSON, CHARLES WORLEY, PAUL HITE, JESS MUSICK, AND J. E. BULLEN

RONALD W. WOODS
MILLIGAN & COLEMAN
P. O. Box 1060
Greeneville, Tennessee
37744-1060
(615) 639-6811

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the Courts below correctly hold that decisions made by the Tennessee Valley Authority (hereinafter "TVA") with respect to resale of electric rates and the accounting practices under its contract with the local power distributor were not subject to judicial review in an action brought by one of the distributor's customers who was not a party to the contract?

2. Did the Courts below err in failing to dismiss with prejudice all of petitioner's contract claims against the Town of Greeneville (as owner of the Greeneville Light & Power System), Norman Williamson, Charles Worley, Paul Hite, Jess Musick, and J. E. Bullen (hereinafter collectively "Greeneville")?

3. Did the Courts below correctly hold that the District Court did not have federal questions jurisdiction over Greeneville and the respondent Robert C. Lay under 28 U.S.C. §1331, even though the contract between TVA and Greeneville required Greeneville to keep its books and records in accordance with Federal Energy Regulatory Commission's Uniform System of Accounts as published in the Code of Federal Regulations at 18 C.F.R. §101 (hereinafter "FERC Regulations") and a Tennessee statute applicable to Greeneville's payment of tax equivalents refers to FERC Regulations?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT 2

ARGUMENT 2

I. The Courts Below Correctly Held That The TVA Actions Which Petitioner Challenges Are Not Subject To Judicial Review 2

II. The Courts Below Erred In Failing To Dismiss With Prejudice Petitioner's Contract Claims Against Greeneville 3

III. The Courts Below Correctly Held That The District Court Does Not Have Federal Question Jurisdiction Over Greeneville Under 28 U.S.C. §1331 For Any Of Petitioner's State Law Claims Since No Right Or Immunity Created By The Constitution Or Laws Of The United States Is An Essential Element Of Petitioner's Claim ... 5

Relevancy of FERC Regulations 5

No Claim Arising Under Federal Law 5

FERC Regulations Are Not An Essential Element Of Petitioner's Claims 6

The Cases Cited By Petitioner Do Not Support His Claim 8

No State Law Claim For Tax Equivalents 10

CONCLUSION 11

RELIEF 12

TABLE OF AUTHORITIES

Page

CASES

Banco De Ponce v. Hinsdale Supermarket Corp., 663 F.Supp. 813 (E.D. NY 1987) 9

Christopher v. Cavallo, 662 F.2d 1082 (4th Cir., 1981) 8

Coburn v. City of Dyersburg, 774 S.W.2d 610 (Tenn. Ct. of App. 1989, application for permission to appeal denied, Tenn. 1989) 3

Confederated Housing Associates, Inc. v. Department of Housing and Urban Development, 538 F.Supp. 1158 (E.D. Ark. 1982) 9

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (unanimous opinion 1983) 6, 10

Gulley v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936) 6

Kinsey v. Nestor Exploration, Ltd., 604 F.Supp. 1365 (E.D. Washington 1985) 8

Murphy v. Colonial Federal Savings & Loan Association, 388 F.2d 609 (2nd Cir. 1967) 9

Smith v. Kansas City Title & T. Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (Dissenting Opinion, 1921) 7

FEDERAL STATUTES

12 U.S.C. §1464(a) 9

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 ..... 5, 6, 7

28 U.S.C. §1331(a) 10

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

T.C.A. §7-52-301, et seq. 10

T.C.A. §7-52-303(8)(B)(ii) 5

T.C.A. §7-52-304 11

T.C.A. §7-52-304(4) 11

No. 91-216

In The

Supreme Court of the United States

October Term, 1991

PHILLIP MATTHEWS, ETC.,

Petitioner,

vs.

THE TOWN OF GREENEVILLE, TENNESSEE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS, THE TOWN OF GREENEVILLE, TENNESSEE, NORMAN WILLIAMSON, CHARLES WORLEY, PAUL HITE, JESS MUSICK, AND J. E. BULLEN

OPINIONS BELOW

Opinions of the Court of Appeals (Pet. App. xxiv-xliv) in the District Court (Pet. App. iii-xviii) are not reported. The Court of Appeals' decision is noted at 932 F.2d 968.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 2, 1991. The Petition for Writ of Certiorari was filed on July 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

STATEMENT

Greeneville hereby joins TVA and adopts TVA's Statement. Greeneville would note in addition that Greeneville urged the Court of Appeals to exercise it's inherent power to modify the District Court Judgment to provide that Greeneville should be dismissed with prejudice in order to correct the internal inconsistency of the District Court's Final Order which dismissed TVA with prejudice and the remaining defendants without prejudice.

ARGUMENT

I.

The Courts Below Correctly Held That The TVA Actions Which Petitioner Challenges Are Not Subject To Judicial Review.

Greeneville hereby joins TVA and adopts the argument of TVA and the cited authorities that the courts below correctly held that challenged actions are not subject to judicial review and that Petitioner is not an intended third-party beneficiary of the TVA-Greeneville Power Contract (hereinafter the "contract") and thus has

no standing to sue TVA or Greeneville for any of the claims asserted by his Amended and Restated Complaint.

With respect to discovery matters, Greeneville also joins with TVA and adopts its argument and cited authorities that Petitioner is barred from seeking relief by his failure to timely object to the Magistrate's ruling and that, in any event, his claim is without merit.

II.

The Courts Below Erred In Failing To Dismiss With Prejudice Petitioner's Contract Claims Against Greeneville.

The District Court originally dismissed Petitioner's claims against all defendants with prejudice. Upon Petitioner's motion, the District Court amended its judgment to dismiss without prejudice Petitioner's claims against Greeneville by treating the same as pendent state law claims. Greeneville respectfully submits that the District Court's ruling that TVA's actions under the contract cannot be judicially reviewed precludes a state action by the petitioner against Greeneville on the same claims. To permit otherwise, Petitioner would be allowed to do indirectly that which he cannot do directly, *i.e.* judicially review TVA's actions under the contract.

Even assuming for purposes of argument that state law governs the issue of whether Petitioner has a claim against Greeneville as a third-party beneficiary, his contract claims against Greeneville should nevertheless have been dismissed with prejudice since Tennessee law is in accord with federal law on this issue. *Coburn v. City of*

Dyersburg, 774 S.W.2d 610 (Tenn. Ct. of App. 1989, application for permission to appeal denied, Tenn. 1989) at 612, states:

> "A contract entered into by a governmental entity requires a showing that the contract was intended by the parties to confer a direct obligation to identifiable third-party entities. Every contract into which a governmental entity enters is made for the benefit of all its citizens. Only when such a contract manifests a specific intent to grant individual citizens enforceable rights thereunder may a citizen claim such rights as a third-party beneficiary." (citations omitted).

Succinctly put, Tennessee law requires a showing of specific intent to grant individual citizens enforceable rights under a contract with a governmental entity. Absent such a showing an individual citizen " . . . is merely an incidental beneficiary and has no right to assert remedies properly reserved for the parties to the . . . contract." Supra at 612. Without question, Petitioner has failed to make the required showing of a specific intent to grant him enforceable rights under the TVA-Greeneville Power Contract and therefore lacks standing under Tennessee law to pursue any claim thereunder as a third-party beneficiary.

III.

The Courts Below Correctly Held That The District Court Does Not Have Federal Question Jurisdiction Over Greeneville Under 28 U.S.C. §1331 For Any Of Petitioner's State Law Claims Since No Right Or Immunity Created By The Constitution Of Laws Of The United States Is An Essential Element Of Such Claims.

Relevancy Of FERC Regulations.

Assuming that Petitioner has stated a cause of action under state law, his argument that the application, interpretation and construction of FERC regulations provides an independent basis for federal question jurisdiction is fatally flawed. As the record reflects, FERC regulations are relevant to Petitioner's claims on two grounds; first, the contract requires Greeneville to keep its books and records in accordance with FERC regulations, and second, state law refers to the account, "electric plant purchased or sold" as prescribed by FERC regulations in defining "net plant value of the electric plant" under the Tennessee statute which allows payment of tax equivalents by Greeneville. T.C.A. §7-52-303(8)(B)(ii). Petitioner failed to include his tax equivalent claims in his Petition.

No Claim Arising Under Federal Law.

As previously noted, Petitioner is not a third-party beneficiary of the contract thus the contract cannot provide federal question jurisdiction following the dismissal of his contract claims. Likewise, Petitioner has not shown a breach of any duty owed him and arising under federal law.

FERC Regulations Are Not An Essential Element Of Petitioner's Claims.

Even assuming for purposes of argument that Petitioner has standing under state law to require Greeneville to keep its books and records in accordance with FERC regulations, either as a result of the contract or state law pertaining to the payment of tax equivalents, Petitioner has still failed to bring a case under 28 U.S.C. § 1331 since the application of FERC regulations is not an essential element of Petitioner's cause of action.

As stated by Justice Cardozo in *Gulley v. First National Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, ___, 81 L.Ed. 70, 72 (1936);

> "To bring a case within the statute (U.S.C. 28 § 1331), a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." (Citations omitted).

This principle espoused by Justice Cardozo in 1936 is still the law. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (unanimous opinion 1983). "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gulley*, supra, at 299 U.S. 115, 57 S. Ct. ___, 81 L.Ed. 73. To adopt Petitioner's interpretation that federal question jurisdiction may arise pursuant to a contract which states that a party shall keep its books and records in accordance with FERC regulations would be tantamount to allowing parties by contract to confer subject matter jurisdiction by simply providing that the contract would be governed by a particular federal law. Likewise, an

interpretation of 28 U.S.C. § 1331 which creates subject matter jurisdiction in a situation where Greeneville is required by a state statute to exclude an account prescribed by FERC regulations in calculating permissible tax equivalent payments would confer subject matter jurisdiction in the district courts in all state matters where a particular state law refers to a federal statute or federal regulation. These results are obviously not the intent of 28 U.S.C. § 1331. In the words of Justice Holmes,

> "If [state] law authorizes or forbids [something] according to the determination of this court upon a point under the Constitution or acts of Congress, still that point is only material because the [state] law saw fit to make it so. The whole foundation of the duty is [state] law, which, at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force, but upon the law that took it up; . . . the cause of action arises wholly from the law of the state.
>
> But it seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action. . . . [T]he law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by state law of a United States law as a criterion or test, when the law of the United States has no force proprio vigore, does not cause a case under the state law to be also a case under the law of the United States, and so it has been decided by this court again and again. (Citations omitted) *Smith v. Kansas City Title & T. Co.*, 255 U.S. 180, 214, 41

S.Ct. 243, ___, 65 L.Ed. 577, 591 (Dissenting Opinion, 1921)."

The Cases Cited By Petitioner Do Not Support His Claim.

The cases cited by Petitioner do not support his assertion that the application, interpretation and construction of FERC regulations forms an independent basis for federal question jurisdiction.

Christopher v. Cavallo, 662 F.2d 1082 (4th Cir., 1981), was a suit by Christopher that Cavallo had breached a contractual warranty that Cavallo had sufficient title to sell and license a play. Since the play had been found to be an infringement upon a federal copyright, the District Court found that the issue of infringement of a copyright was an essential element of the cause of action for breach of warranty; the question of infringement of federal copyrights is an area of exclusive original jurisdiction of the district courts thus, subject matter jurisdiction existed. The Fourth Circuit Court of Appeals affirmed this ruling.

Kinsey v. Nestor Exploration, Ltd., 604 F.Supp. 1365 (E.D. Washington 1985), involved a removal action of two security suits brought in state court under the Securities Act of 1933, Securities Act of 1934 and Federal RICO statutes. In this case, Kinsey resisted removal on the basis that he was seeking a remedy under state law. The District Court in allowing removal of various issues in the case stated that the gravamen of the underlying transaction not the remedy asserted must be addressed in determining jurisdiction. *Supra* at 1368. In other words, federal

jurisdiction exists if there is alleged a violation of federal law even though a state remedy is sought.

Banco De Ponce v. Hinsdale Supermarket Corp., 663 F.Supp. 813 (E.D. NY 1987), is an interpleader action brought by Banco De Ponce seeking declaration of the rights of Hinsdale Supermarket and a New York state agency of certain food stamps held on account with Banco De Ponce. Banco De Ponce asserted that the interpretation of federal regulations pertaining to food stamps formed the basis for federal question jurisdiction. The court found that no substantial federal question existed which would support the interpleader's action. *Supra* at page 820.

Murphy v. Colonial Federal Savings & Loan Association, 388 F.2d 609 (2nd Cir. 1967), is a case where members of the federal savings and loan association brought suit after management refused to provide them with a list of members. The Second Circuit Court of appeals held that the intent of Congress in enacting 12 U.S.C. § 1464(a) which authorizes the Federal Home Loan Bank Board to prescribe rules and regulations for the organization and operation of federal savings and loan associations "was an intent that the rights of the members of federal savings and loan associations to fair elections be governed by federal law." *Supra*, at 611.

Finally, *Confederated Housing Associates, Inc. v. Department of Housing and Urban Development*, 538 F.Supp. 1158 (E.D. Ark. 1982), was a suit against a federal agency involving not a question of state law but a question of whether validly enacted administrative regulations by the federal agency could be treated as laws of the United

States under 28 U.S.C. § 1331(a). The District Court held that validly issued administrative regulations may be treated as laws of the United States under 28 U.S.C. § 1331(a). *Supra,* at 1162. This case does not address the primary issue of whether a case similar to Petitioner involves as an essential element a right or immunity created by the Constitution or the laws of the United States.

In summary, Petitioner has failed to assert a claim that a right or immunity created by the Constitution or laws of the United States is an essential element of his cause of action. His pleadings likewise fail to fall under the "well-plead complaint rule" which allows a state law cause of action to be brought in federal court where there appears that some substantial, disputed question of federal law is a necessary element of a well-plead state claim. See generally *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, supra.*

No State Law Claim For Tax Equivalents.

Finally, although Petitioner has alleged in his Complaint that Greeneville failed to comply with FERC regulations resulting in an understatement of Greeneville's physical assets, which allegedly reduced the amount of payments in lieu of taxes (tax equivalents) that were paid by Greeneville to the Town of Greeneville and Greene County pursuant to T.C.A. § 7-52-301, et seq., the record will reflect that Petitioner has at no time requested any relief with respect to the payment of tax equivalents,

except the request for the issuance of a mandamus requiring the Town of Greeneville to keep its books and records in accordance with FERC regulations, nor has Petitioner presented any argument that he has a claim under state law pertaining to the payment of tax equivalents. Indeed, he can present no valid argument in light of the fact that the payment of tax equivalents are discretionary and not mandatory, T.C.A. § 7-52-304, and any dispute concerning the amount of tax equivalents paid during the time period addressed by Petitioner's complaint are all time barred pursuant to T.C.A. § 7-52-304(4).

CONCLUSION

In accordance with the foregoing argument and upon the authorities cited therein, it is clear that the only error committed by the Courts below was the failure of the District Court to dismiss *with prejudice* Petitioner's contract claims against Greeneville and thus the Petition for a Writ of Certiorari should be *denied*.

RELIEF

Should the Petition for a Writ of Certiorari be granted, Greeneville will request that the District Court's judgment be *modified* to provide that the contract claims of Petitioner against Greeneville be *dismissed with prejudice.*

Respectfully submitted,

RONALD W. WOODS
Attorney for The
Town of Greeneville, Tennessee,
Norman Williamson, Charles Worley,
Paul Hite, Jess Musick and
J. E. Bullen

Of Counsel:
MILLIGAN & COLEMAN
P.O. Box 1060
109 South Main Street
Greeneville, TN 37744-1060
(615) 639-6811

Supreme Court, U.S.
FILED
OCT 10 1991
OFFICE OF THE CLERK

(3)

No. 91-216

In The

Supreme Court of the United States

October Term, 1991

PHILLIP MATTHEWS,

Petitioner,

v.

GREENEVILLE LIGHT AND POWER SYSTEM, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

BRIEF FOR RESPONDENT ROBERT C. LAY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWIN L. TREADWAY
WILLIAM C. BOVENDER
HUNTER, SMITH & DAVIS
Post Office Box 3740
Kingsport, Tennessee 37664
(615) 378-8800
Counsel for Respondent
Robert C. Lay

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In the absence of Respondent Tennessee Valley Authority as a party, did the district court have an independent basis for subject matter jurisdiction under 28 U.S.C. § 1331 because the power contract between the Respondents Tennessee Valley Authority and the Town of Greeneville, TN. incorporated certain Federal Energy Regulatory Commission accounting guidelines?

PARTIES TO THE PROCEEDINGS

The Petitioner in this action is Phillip Matthews. The Respondents in this action are the Tennessee Valley Authority (hereinafter, "TVA"); Robert C. Lay, the Town of Greeneville, TN.; Norman Williamson, acting superintendent of the Greeneville Light & Power System (hereinafter, "GL&PS"), and Charles Worley, Paul Hite, Jess Musick and J. E. Bullen, members of the Board of Greeneville Light & Power System.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT 2

ARGUMENT:

A. NO FEDERAL QUESTION JURISDICTION IN THE ABSENCE OF TVA AS A PARTY 7

B. NO CASE SUPPORT FOR PETITIONER'S POSITION 11

C. NO PENDENT JURISDICTION 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES CITED:

Becker v. Beame, 454 F. Supp. 867 (S.D.N.Y. 1978) 10

Brame v. Ray Bills Finance Corp., 85 F.R.D. 568 (D.C.N.Y. 1979) 11

Christopher v. Cavallo, 662 F.2d 1082 (4th Cir. 1981) 11

Federal Housing Associates, Inc. v. Department of Housing and Urban Development, 538 F. Supp. 1158 (E.D. Ark. 1982) 12

Franchise Tax Bd. v. Laborers Vac. Trust, 463 U.S. 1 (1983) 8, 9, 10

Gully v. First National Bank, 229 U.S. 109, 81 L.Ed. 70 (1936) 10

Kinsey v. Nestor Exploration, Ltd., 604 F. Supp. 1365 (E.D. Wa. 1985) 11

Lindy v. Lynn, 501 F.2d 1367 (3rd Cir. 1974) 10

Merrill Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 92 L.Ed. 2d 650 (1986) 7, 10

Murphy v. Colonial Federal Savings & Loan Association, 388 F.2d 609 (2nd Cir. 1967) 11

Nuclear Engineering Co. v. Scott, 660 F.2d 241 (7th Cir. 1981), cert. denied, 455 U.S. 933, 71 L.Ed.2d 855 11

United Air Lines v. Division of Indus. Safety, 633 F.2d 814, 816 (9th Cir. 1980) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

16 U.S.C. §§ 825, 825(a) 10

28 U.S.C. § 1254(1) (1988) 2

28 U.S.C. § 1331 ..... 6, 8

28 U.S.C. § 1331(a) 12

18 C.F.R. Part 101 10

T.C.A. § 7-52-101 3

T.C.A. § 7-52-107 3

T.C.A. § 7-52-114(b) 3

T.C.A. § 7-52-116(A) 3

T.C.A. § 7-52-117 4

T.C.A. § 7-52-117(a) 3

T.C.A. § 7-52-117(d) 3

T.C.A. § 7-52-306 3

OTHER AUTHORITIES:

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3563, p. 54 10

No. 91-216

In The

Supreme Court of the United States

October Term, 1991

PHILLIP MATTHEWS,

Petitioner,

v.

GREENEVILLE LIGHT AND POWER SYSTEM, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

BRIEF FOR RESPONDENT ROBERT C. LAY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert C. Lay respectfully requests that this Court deny the petition for Writ of Certiorari seeking review of the Sixth Circuit decision entered on May 2, 1991.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. xxiv-xliv) and the district court (Pet. App. iii-xviii) are not

reported. The court of appeals' decision is noted at 932 F.2d 968.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1991. The petition for a writ of certiorari was filed July 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT

Respondent Lay adopts by reference the STATEMENT of Respondent TVA contained in TVA's Brief in Opposition. TVA, except to note the language of the court of appeals, has chosen not to address Petitioner's QUESTION FOR REVIEW No. 3 dealing with federal question jurisdiction. Respondent Lay, while restating this question, restricts his Brief to a discussion of the lack of federal question jurisdiction over the Petitioner's alleged claims for relief against him and the Respondents other than TVA.

When this action was originally filed in November, 1988, Respondent Lay was the General Manager (or Superintendent) of GL&PS. Petitioner Matthews had, until August, 1988, been the controller of GL&PS for a number of years, reporting directly to Respondent Lay. In August, 1988, Respondent Lay terminated Petitioner Matthews. Petitioner filed a separate alleged wrongful discharge action against Respondent Lay and others in the

district court, NO. CIV. 2-88-468, which currently is set to be tried on October 21, 1991. Petitioner also filed an action in the Chancery Court for Greene County, Tennessee against Respondent Lay and others in April, 1989 (Civil Action No. 89-108) alleging most of the claims for relief under state law which petitioner asserts in this action. Like the discharge case, the case in state court remains pending at this time, with no trial date having been set.

GL&PS was created by the Respondent Town of Greeneville, Tennessee pursuant to the Municipal Electric Plant Law of 1935, T.C.A. § 7-52-101 – § 7-52-306 (as amended). Under that state law, the Town was authorized to and did create the GL&PS Board. T.C.A. § 7-52-107. Respondents Worley, Hite, Musick and Bullen comprised this Board. "The general supervision and control of the acquisition, improvement, operation and maintenance of the electric plant falls to the Board." T.C.A. § 7-52-116(a). The state law confers various powers upon the Board including the authority to " . . . appoint an electric plant superintendent." T.C.A. § 7-52-114(b). The Superintendent serves " . . . at the pleasure of the supervisory body and may be removed by such body at any time." *Id.* The Superintendent has charge of "all actual construction, the immediate management and operation of the electric plant and the enforcement and execution of all rules, regulations, programs, plans and decisions made or adopted by the [Board]." T.C.A. § 7-52-117(a). He appoints "all employees" and fixes their "duties and compensation", with certain exceptions. T.C.A. § 7-52-114(b). He makes "all contracts, subject to the approval of the [Board]." T.C.A. § 7-52-117(d). He also has other powers

and responsibilities subject to the approval, supervision and direction of the Board. *Id.*

As noted by Petitioner, both an Original and Amended and Restated Complaint were filed by Petitioner in the district court. (Pet. 8, 12-14). (*See*, R. 17-39: Amended and Restated Complaint, pp. 1-23). The allegations against Respondent Lay in said Amended and Restated Complaint were as follows:

1. Lay, as manager of GL&PS, willfully failed "to keep full and proper books and records", and, as such, violated Tennessee law (T.C.A. § 7-52-117) (R. 25-26);

2. Lay issued directions which resulted in GL&PS violating certain accounting guidelines of the Federal Energy Regulatory Commission (which the power contract between TVA and GL&PS required GL&PS to utilize). This allegedly violated state law. (*Id.*);

3. By so acting, Lay caused the Town of Greeneville to breach its contract with TVA (*Id.*);

4. The requirement that the Superintendent make and keep full and proper records in accordance with the FERC guidelines was ministerial in nature and was therefore appropriate for the issue of a writ of mandamus to Lay and the Board (R. 26-27);

5. Lay willfully failed to perform his statutory obligations under state law resulting in the GL&PS expenses to be overstated and its net income understated (*Id.*);

6. Lay, in willfully failing to observe said accounting guidelines as required by contract, caused Petitioner to suffer injury through the imposition of higher electric rates, subjecting Lay to personal liability under state law (*Id.*);

7. Lay tortiously induced the Town of Greeneville to breach its contract with TVA, making Lay liable for treble damages under state law (*Id.*);

8. As a result of Lay's failure to abide by the FERC guidelines, the amount paid by GL&PS in lieu of taxes to the Town of Greeneville and Greene County under state law was reduced (R. 31); and

9. As a result of Lay's failure to abide by the FERC guidelines, GL&PS generated funds in excess of $10,000,000, even though it was not supposed to make a profit under state law. (R. 32).

Respondent Lay filed Motions to Dismiss, which, along with Motions filed by the other Respondents, were treated as motions for summary judgment by the district court. (Pet. App. iii-iv). In its original Order and Memorandum (Pet. App. ii-xvii), the claims against the non-TVA Respondents were dismissed with prejudice. (*Id.*). The district court found that absent the presence of TVA, " . . . the plaintiff's remaining claims are all based upon state law. These include breach of contract, tortious breach of contract and misfeasance in office." (Pet. App. xv). Recognizing that it had only "minimal discretion" in deciding whether to exercise pendent jurisdiction over

these state law claims once federal claims has been dismissed, it held that "judicial economy is not substantially served by proceeding solely upon the state law claims." (*Id.*).

Petitioner filed a Motion for Reconsideration and the district court ultimately modified its original decision by holding the dismissal of the claims against all Respondents except TVA would be without prejudice. (Pet. App. xviii-xix). In doing so, the district court reiterated that even though the power contract between TVA and the Town of Greeneville incorporated the FERC guidelines, " . . . the plaintiff's claim remains essentially a breach of contract action grounded in state law." (Pet. App. xxii-xxiii). The court of appeals held the district court did not abuse its discretion in dismissing the claims against Respondent Lay and the others without prejudice, finding neither an "overwhelming interest in judicial economy" nor any compelling "fairness concerns", which would support continued federal subject matter jurisdiction. (Pet. App. xli-xlii).

~~In foot~~note 5 to its decision, the court of appeals rejected Petitioner's argument that an independent basis for federal question jurisdiction under 28 U.S.C. § 1331 arose from the FERC accounting guidelines:

> " . . . we cannot conclude that the FERC accounting guidelines create any cause of action. Instead, this case involves the interpretation of a contract which invoked federal accounting standards. It is well settled that 'the mere presence of a federal issue in a state cause of action does

> not automatically confer federal question jurisdiction.' *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986)"

(Pet. App. xlii-xliii). Petitioner did not seek rehearing by the panel or rehearing en banc.

ARGUMENT

A. NO FEDERAL QUESTION JURISDICTION IN THE ABSENCE OF TVA AS A PARTY

Respondent Lay adopts by reference and incorporates herein the ARGUMENT of Respondent TVA with respect to the issues addressed therein. TVA has chosen not to address the third question raised by the petition which, while confusing *in personam* jurisdiction with subject matter jurisdiction [*See*, e.g., the wording of QUESTIONS PRESENTED FOR REVIEW. No. 3 (Pet., p. ii)], essentially asserts that in the absence of TVA as a party, there is some independent basis for federal question jurisdiction over the alleged claims for relief asserted against the remaining Respondents, because the power contract between TVA and the Town of Greeneville incorporates certain Federal Energy Regulatory Commission accounting guidelines. It is this jurisdiction question which Respondent Lay addresses herein.

It is respectfully asserted that there is no basis for federal question jurisdiction over any alleged claims for relief asserted against the non-TVA Respondents including Respondent Lay. This case involves only the application of well-settled principles of law by the district court and the court of appeals, and the decisions below do not

conflict with any decision of this Court or any other court of appeals. Further review, accordingly, is not warranted.

Paragraph 8 of the "Power Contract Between Tennessee Valley Authority and City of Greeneville, Tennessee" incorporates into said contract certain additional provisions which are contained in a document entitled "SCHEDULE OF TERMS AND CONDITIONS," which is separately attached to the contract and made a part thereof by reference. (R. 43: p. 6). Section 1(b) of this "SCHEDULE" reads in pertinent part:

> "(b) Municipality shall keep the general books of accounts of the electric system according to the Federal Regulatory Commission Uniform System of Accounts . . . "

(R. 51). This "SCHEDULE" places a number of additional contractual obligations on the "municipality."

Petitioner argues that because GL&PS is contractually required to keep its books in accordance with these FERC guidelines, federal question jurisdiction is thus created over claims for relief that arise from state law.

In *Franchise Tax Bd. v. Laborers Vac. Trust*, 463 U.S. 1, 77 L.Ed. 2d 420 (1983), this Court embarked on a review of the Court's previous decisions which examined what tests should be applied in determining whether a "civil action" arises under the Constitution, laws or treaties of the United States. *See*, 28 U.S.C. § 1331. Mr. Justice Brennan's opinion, speaking for a unanimous Court concludes:

> *"Our concern in this case is consistent application of a system of statutes conferring original federal court jurisdiction, as they have been interpreted by this*

> *Court over many years. Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."*

463 U.S., at 27-28, 77 L.Ed. 2d, at 442. (Emphasis added)

Petitioner must rely upon the allegations against Respondent Lay contained in his Amended and Restated Complaint in the application by this Court of the above-quoted principles. *Id.* To the extent that any of the allegations of said Complaint state claims for relief, any and all are state law-based claims: (1) plaintiff has alleged Respondent Lay willfully failed "to keep full and proper books and records," a violation of state law, (2) that Lay issued directives which caused GL&PS to violate the FERC guidelines, and this is a violation of state law; (3) that Lay caused the Town of Greeneville to breach its contact with TVA, breach of contract being a state law claim for relief; (4) that Lay engaged in certain ministerial acts which violated state law, making mandamus proper; (5) that Lay's acts resulted in Petitioner paying higher electric rates, making Lay personally liable under state law; (6) that Lay tortiously induced the Town of Greeneville to breach its contract with TVA, a state law claim for relief; (7) that the amount of payments made to state governmental subdivisions in lieu of taxes were reduced by Lay's acts, these payments being a function of state law; and (8) that Lay's actions resulted in the generation of reserve funds, when the utility was to be operated on a non-profit basis under state law. (R. 17-39; Amended and

Restated Complaint, pp. 1-23) It is abundantly clear that no federal law created these causes of action or claims for relief, to the extent they are causes of action or claims for relief at all. 463 U.S., at 27, 28. All are creatures of Tennessee law. *Id.; Gully v. First National Bank,* 299 U.S. 109, 81 L.Ed. 70 (1936).

The second part of the *Franchise Tax Board* guideline concerns whether Petitioner's "right to relief necessarily depends on resolution of a substantial question of federal law. 463 U.S., at 27, 28. The inclusion of FERC accounting guidelines in a contract creates no question which requires the "resolution" of any federal law question. *Lindy v. Lynn,* 501 F.2d 1367 (3rd Cir. 1974); *Becker v. Beame,* 454 F. Supp. 867 (S.D.N.Y. 1978). No federal law, not even the FERC guidelines themselves, 18 C.F.R. Part 101, places any legal obligations on GL&PS to even utilize these guidelines. More importantly, there is no federal claim for relief created either by the Federal Power Act or by the guidelines themselves when they are not followed. *Id.; see,* 16 U.S.C. §§ 825, 825(a).

Even where there are allegations contained in a complaint which allege a direct violation of federal law as part of a state law cause of action, there is no federal question jurisdiction "when Congress has determined there should be no private, federal cause of action for the violation . . . " of the federal law. *Merrill Dow Pharmaceuticals v. Thompson,* 478 U.S. 809, 817, 92 L.Ed. 2d 650, 664 (1986). Moreover, where state law incorporates an Act of Congress or other federal law as the applicable state standard, the "sounder view" is that federal question jurisdiction is not created except "when federal law is applicable by its own force." Wright, Miller & Cooper,

Federal Practice and Procedure: Jurisdiction 2d § 3563, p. 54; *see also, United Air Lines v. Division of Indus. Safety*, 633 F.2d 814, 816 (9th Cir. 1980); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981), *cert. denied*, 455 U.S. 993, 71 L.Ed.2d 855; *Brame v. Ray Bills Finance Corp.*, 85 F.R.D. 568 (D.C.N.Y. 1979). Here, no federal cause of action has been created if FERC guidelines are not followed. There is no corresponding state law which mandates these guidelines be followed and creates a specific state law claim for relief if they are not. Surely, no substantial federal law question can thus arise where the FERC guidelines are merely incorporated into a contract. *Id.*

B. NO CASE SUPPORT FOR PETITIONER'S POSITION

No case cited by Petitioner supports his proposition that federal question jurisdiction is created by the inclusion of the guidelines in a contract. *Christopher v. Cavallo*, 662 F.2d 1082 (4th Cir. 1981) dealt with copyright infringement as an essential element of an action for breach of warranty, and since infringement was an area of exclusive original jurisdiction of the federal courts, subject matter jurisdiction existed. *Kinsey v. Nestor Exploration, Ltd*, 604 F. Supp. 1365 (E.D. Wa. 1985) holds only that federal jurisdiction exists where there is alleged a violation of federal law, where federal remedies are provided, even if a state remedy is sought. *Murphy v. Colonial Federal Savings & Loan Association*, 388 F.2d 609 (2nd Cir. 1967) recognizes that federal question jurisdiction exists where the intent of Congress was "that the rights of the

members of *federal* savings and loan associations to fair elections be governed by *federal law.*" *Supra,* at 611 (emphasis added). *Federal Housing Associates, Inc. v. Department of Housing and Urban Development,* 538 F. Supp. 1158 (E.D. Ark. 1982), involved a suit against a *federal agency,* had no state law claim for relief involved, and merely recognized that validly enacted administrative regulations could be treated as laws of the United States under 28 U.S.C. § 1331(a).

C. NO PENDENT JURISDICTION

Petitioner has apparently abandoned any argument that the district court should have retained pendent jurisdiction over the state law claims asserted against Respondent Lay after dismissal of TVA. There is, however, no basis for dispute with respect to finding by the district court that these existed no "overwhelming interests in judicial economy" which suggested the district court should retain jurisdiction over same in the absence of TVA as a party. (Pet. App. xvi-xvii). Likewise, there is no basis for questioning the findings of the court of appeals that it could not "discern either an 'overwhelming interest in judicial economy', or fairness issue, which would compel a reversal of the district court's dismissal of pendent state law claims." (Pet. App. xli-xlii).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN L. TREADWAY
WILLIAM C. BOVENDER
HUNTER, SMITH & DAVIS
Post Office Box 3740
Kingsport, Tennessee 37664
(615) 378-8800
Counsel for Respondent
Robert C. Lay

(4)

No. 91-216

Supreme Court, U.S.
FILED
OCT 15 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIP MATTHEWS, PETITIONER

v.

GREENEVILLE LIGHT AND POWER SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT TENNESSEE VALLEY AUTHORITY IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

EDWARD S. CHRISTENBURY
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

JAMES E. FOX
Deputy General Counsel

ROBERT C. GLINSKI
Assistant General Counsel

THOMAS C. DOOLAN
Senior Litigation Attorney
Tennessee Valley Authority
Knoxville, Tennessee 37902

18

QUESTIONS PRESENTED

1. Whether a non-party to a contract under which the Tennessee Valley Authority sells electric power to a municipal distributor of that power may obtain judicial review, under the Administrative Procedure Act, of the resale rates prescribed by the contract or of an alleged failure by TVA to enforce certain terms of the contract.

2. Whether the non-party may pursue an action against TVA on the theory that he is a third-party beneficiary of the contract.

3. Whether the district court had federal question jurisdiction over contract claims asserted by the non-party against the municipal distributor, its governing board, and two of its officers.

4. Whether the district court abused its discretion when it ruled on motions for summary judgment without first allowing petitioner to take certain discovery.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Allen v. *Electric Power Bd.*, 422 F. Supp. 4 (M.D. Tenn. 1976), appeal dismissed, No. 76-2678 (6th Cir. Sept. 21, 1978)	10
Berberich v. *United States*, 5 Cl. Ct. 652 (1984), aff'd, 770 F.2d 179 (Fed. Cir. 1985)	12
Beverly v. *Macy*, 702 F.2d 931 (11th Cir. 1983)	11
Carborundum Co. v. *Tennessee Valley Authority*, 521 F. Supp. 590 (E.D. Tenn. 1981), aff'd, 705 F.2d 451 (6th Cir. 1982)	10
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	8
Consolidated Aluminum Corp. v. *Tennessee Valley Authority*, 462 F. Supp. 464 (M.D. Tenn. 1978)	10
Ferguson v. *Electric Power Bd.*, 378 F. Supp. 787 (E.D. Tenn. 1974), aff'd, 511 F.2d 1403 (6th Cir. 1975)	10
German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U.S. 220 (1912)	11
Heckler v. *Chaney*, 470 U.S. 821 (1985)	6, 8, 10, 11
Hoke Co. v. *Tennessee Valley Authority*, 854 F.2d 820 (6th Cir. 1988)	10
Johnson Controls, Inc. v. *United States*, 8 Cl. Ct. 359 (1985), aff'd, 795 F.2d 1011 (Fed. Cir. 1986)	12
King v. *National Indus., Inc.*, 512 F.2d 29 (6th Cir. 1975)	11
Merrell Dow Pharmaceuticals Inc. v. *Thompson*, 478 U.S. 804 (1986)	13
Mobil Oil Corp. v. *Tennessee Valley Authority*, 387 F. Supp. 498 (N.D. Ala. 1974)	9, 10

Cases—Continued: Page

Nguyen v. *United States Catholic Conference*:
548 F. Supp. 1333 (W.D. Pa. 1982) 12
719 F.2d 52 (3d Cir. 1983) 11, 12
Price v. *Pierce*, 823 F.2d 1114 (7th Cir. 1987), cert. denied, 485 U.S. 960 (1988) 11
Public Serv. Co. v. *United States*, 5 Cl. Ct. 818 (1984) 11
Reiner v. *West Village Assocs.*, 600 F. Supp. 233 (S.D.N.Y.), aff'd, 768 F.2d 31 (2d Cir. 1985) 12
Roberts v. *Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977) 11
Schell v. *National Flood Insurers Ass'n*, 520 F. Supp. 150 (D. Colo. 1981) 12
Tennessee Elec. Power Co. v. *Tennessee Valley Authority*, 306 U.S. 118 (1939) 2
Tennessee Valley Authority v. *Exxon Nuclear Co.*, 753 F.2d 493 (6th Cir. 1985) 11
Thomas v. *Arn*, 474 U.S. 140 (1985) 14
United States ex rel. TVA v. *Welch*, 327 U.S. 546 (1946) 10
Webster v. *Doe*, 486 U.S. 592 (1988) 8

Statutes and rule:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 5
5 U.S.C. 701(a) 6
5 U.S.C. 701(a)(2) 7
5 U.S.C. 702(a)(2) 8
Tennessee Valley Authority Act of 1933, 16 U.S.C. 831-831dd 2
16 U.S.C. 831i 3, 4, 8
16 U.S.C. 831j 2, 7
16 U.S.C. 831n-4(f) 9
28 U.S.C. 1331 ..... 5, 13
50 U.S.C. 403(c) 8
Fed. R. Civ. P. 72(a) 14

Miscellaneous:

Restatement (Second) of Contracts (1979) 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-216

PHILLIP MATTHEWS, PETITIONER

v.

GREENEVILLE LIGHT AND POWER SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT TENNESSEE VALLEY AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Axxiv-Axliv) is unpublished, but the decision is noted at 932 F.2d 968 (Table). The pertinent opinions of the district court (Pet. App. Aiii-Axviii, Axx-Axxiii) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1991. The petition for a writ of certiorari was filed on July 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

---

[1] The following respondents are not identified in the caption: the Tennessee Valley Authority; the Town of Greene-

STATEMENT

1.a. In accordance with the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831-831dd, the Tennessee Valley Authority produces and sells electric power at wholesale to 160 municipal and cooperative distributors. The power is resold to millions of residential, commercial, industrial, and governmental users. See *Tennessee Elec. Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939); Pet. App. xxiv. The City of Greeneville, Tennessee, has been a municipal distributor of TVA power since 1945. C.A. App. 41, 114.

The TVA Act includes a broad policy statement regarding sales of TVA power. The statute declares, *inter alia*, that TVA projects (16 U.S.C. 831j):

> shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity.
> * * *

To advance those policies and other purposes of the TVA Act, TVA "is authorized to include in any contract for the sale of power such terms and condi-

---

ville, Tennessee; Robert Lay, manager of the Greeneville Light and Power System (GLPS); Norman Williamson, acting GLPS Superintendent; and Charles Worley, Jess Musick, Paul Hite, and J.E. Bullen, members of the GLPS Board of Public Utilities.

tions, including resale rate schedules, * * * as in its judgment may be necessary or desirable for carrying out the purposes of" the Act. 16 U.S.C. 831i. Pursuant to that provision, TVA's contracts with Greeneville and other distributors contain resale rate schedules specifying the rates at which the power will be resold to the distributors' retail customers. Although TVA charges the same wholesale rates to each of the 160 distributors of its power, TVA chooses from among a number of alternative resale rate schedules when it contracts with a distributor. (In 1985, when TVA and Greeneville entered into their most recent contract, there were 20 retail rate schedules for residential service and the same number for general power.) C.A. App. 114-115.

The choice of the appropriate resale rate schedule for a particular distributor is the subject of discussions between TVA and the distributor. In making its judgment as to the appropriate schedule, TVA takes into account a number of factors, including the distributor's anticipated revenues and expenses, actual and projected capital additions to the electric system, the system's need for working capital, and existing and proposed borrowings. C.A. App. 114-115.

TVA's most recent contract with Greeneville took effect in 1985. Under that contract, Greeneville's resale rates were reduced one level lower than those prescribed by the prior contract, but were higher than TVA had initially recommended. The higher rate schedule was chosen when Greeneville indicated that anticipated capital additions to its system and its desire to reduce outstanding debt made the reductions sought by TVA unfeasible. C.A. App. 116-117.

In accordance with the TVA Act, 16 U.S.C. 831i, Greeneville's contract requires it to operate on a nonprofit basis. The contract provides that if the resale rates in the contract "provide revenues that are more than sufficient" to operate Greeneville's system "on a self-supporting and financially sound basis," then TVA and Greeneville "shall agree upon a reduction in said rates and charges, and [Greeneville] shall promptly put such reduced rates and charges into effect." Similarly, a provision obligating Greeneville to use its revenues to pay for operating expenses, debt service, new construction, and other purposes benefiting the system provides that "resale rates and charges shall be reduced from time to time to the lowest practicable levels considering such factors as future circumstances affecting the probable level of earnings, the need or desirability of financing a reasonable share of new construction from * * * surplus revenues, and fluctuations in debt service requirements." C.A. App. 41-43.

TVA regularly monitors the financial performance of its distributors. To facilitate that oversight, Greeneville's contract requires it to "keep the general books of accounts of the electric system according to the Federal Energy Regulatory Commission Uniform System of Accounts." Greeneville is also obligated to supply TVA with annual financial reports and to have its financial statements examined by independent certified public accountants in accordance with generally accepted auditing standards. Finally, the Greeneville contract guarantees TVA access to Greeneville's books and records. TVA field accountants review Greeneville's annual reports and independent audit reports. C.A. App. 51, 117-118, 120.

b. Petitioner is the former controller of Greeneville's electric distribution system, the Greeneville Light and Power System (GLPS). Between 1977 and 1988, petitioner executed GLPS's annual financial statements as its "Accountant in charge of books," attesting in each case that Greeneville's "books of account have been kept in accordance with the provisions of the power contract." C.A. App. 118-119.

After his termination in 1988, petitioner commenced this action—in his own right and as a representative of a putative class of purchasers of power—against TVA, Greeneville, the members of GLPS's governing board, and two officers of GLPS.[2] The amended complaint asserts federal jurisdiction under 28 U.S.C. 1331. In essence, the complaint alleges that GLPS has failed to comply with the FERC accounting system prescribed by its contract with TVA; as a result of those accounting practices, the complaint continues, GLPS has overstated its expenses, understated its income, and charged its customers inflated prices for TVA power. See C.A. App. 21-33.

Relief is sought from TVA on two legal theories. First, the amended complaint alleges that petitioner and the members of the putative class are third-party beneficiaries of the TVA-Greeneville contract and that TVA has breached the contract "by failing to reduce power rates when [GLPS] had excess revenues, as the contract mandated." C.A. App. 25, 27. Second, the complaint seeks judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, of

---

[2] Petitioner also filed suit in the United States District Court for the Eastern District of Tennessee against the Town of Greeneville and the superintendent of GLPS, seeking relief for his alleged wrongful termination. That suit, *Matthews* v. *Town of Greeneville*, No. CIV-2-88-468, is still pending.

TVA's allegedly unlawful failures to take action (1) "to fulfill the clear Congressional mandate that TVA power should be sold at the lowest rates feasible"; (2) to compel Greeneville to comply with the contractual provision requiring use of FERC's accounting system; (3) to reduce Greeneville's surplus revenues; and (4) to revise the resale rate schedules in the contract. C.A. App. 29-30. The complaint seeks $10 million in damages for petitioner and the putative class, a writ of mandamus, and other relief. *Id.* at 32-33, 37-38.

c. TVA and the other respondents moved to dismiss the action or for summary judgment. Pet. App. Aii. The district court granted summary judgment in favor of all respondents. Pet. App. Aiii-Axxiii. With respect to TVA, the court concluded that the actions over which petitioner sought APA review—TVA's allegedly unlawful failures to enforce various provisions of Greeneville's contract and to modify the contract's resale rate schedules—were unreviewable under 5 U.S.C. 701(a). Pet. App. Aix-Axv. The court declined to exercise pendent jurisdiction over the remaining state-law claims against the non-federal respondents. *Id.* at Axv-Axvii.

2. The court of appeals affirmed in an unpublished decision. The court noted that a "long line of precedent" establishes "that TVA rates are not judicially reviewable." Pet. App. Axxxi. Similarly, the court continued, petitioner could not obtain review of TVA's alleged "failure to ensure compliance with FERC guidelines." *Ibid.* The court explained that under *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), "presumptively unreviewable," Pet. App. Axxxiv, and an agency's refusal to take enforcement action is it found nothing in the TVA Act that warranted a

departure from that general rule. To the contrary, the court explained, there is no language in the Act "requiring the TVA to take action if a provision in one of its contracts is not followed"; the Act "does not even require action by the TVA [if] there is evidence that electricity is not being provided at the lowest possible rates to consumers"; the Act "accords the TVA a great amount of discretion in its contractual relations with municipalities"; and the statute's "vague admonition to maintain 'the lowest possible rates' does not come close to providing the sort of guidelines which would permit meaningful judicial review." Pet. App. Axxxviii-Axxxix.

The court of appeals held that the district court did not have federal question jurisdiction over petitioner's claims against the remaining respondents and that it was not an abuse of discretion to relinquish pendent jurisdiction over those claims. Pet. App. Axl-Axliii.

ARGUMENT

1. Petitioner contends that the Administrative Procedure Act authorizes broad judicial review of the rate schedules in TVA's contract with Greeneville and of TVA's alleged failure to enforce the contract's terms. Pet. 33-47. As the lower courts held, however, those matters are "committed to agency discretion by law." 5 U.S.C. 701(a)(2). There is no conflict among the courts of appeals on that question, nor is there any other ground warranting this Court's review.

a. The TVA Act includes a broad declaration of the Act's policies regarding sales of surplus power. 16 U.S.C. 831j. One such policy is that sales to businesses and domestic and rural consumers should be structured so as to "permit domestic and rural use at the lowest possible rates and * * * encourage increased domestic and rural use of electricity." *Ibid.*

The question of how best to advance that policy, however, is expressly committed to TVA's judgment. TVA's Board is empowered (16 U.S.C. 831i (emphasis added)):

> to include in any contract for the sale of power such terms and conditions, including resale rate schedules * * * *as in its judgment may be necessary or desirable for carrying out the purposes of this chapter* * * *.

In *Webster* v. *Doe*, 486 U.S. 592, 600 (1988), this Court held that a statutory delegation of comparable breadth foreclosed APA review. Under the statute at issue in *Webster*, the Director of Central Intelligence has discretion to terminate a CIA employee "whenever [the Director] shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. 403(c). This Court noted that this language "fairly exudes deference to the Director, and appears * * * to foreclose the application of any meaningful judicial standard of review." 486 U.S. at 600.[3] Based upon that language and the structure of the Act, the Court held that "Congress meant to commit individual employee discharges to the Director's discretion, and that § 701(a)(2) accordingly precludes judicial review of these decisions under the APA." *Id.* at 601.

The same reasoning applies to the provisions of the TVA Act at issue in this case. Under those provisions, the selection of the appropriate resale rate

---

[3] Section 702(a)(2) forecloses judicial review when a statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. at 830. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

schedule for a given distributor of TVA power is dependent upon TVA's "judgment" regarding what "may be necessary or desirable to carry out the purposes" of the Act. Petitioner's allegations that TVA has failed to reduce Greeneville's resale rates and has thereby violated the congressional policy favoring power sales at the lowest feasible rates challenge TVA's exercise of that judgment. Just as in *Webster*, however, it is clear that Congress intended TVA—and not the courts—to determine what rates would best serve the policies of the TVA Act.[4]

Congress's decision to commit ratemaking issues raised by sales of TVA power to the Authority's expert judgment is understandable. Resale ratemaking involves a number of business and financial considerations—including the distributor's current operating expenses, anticipated improvements to the system, the appropriate sources of financing for such improvements, predictions regarding upcoming economic conditions, the need for working capital and a healthy capital structure, and others. As the court of appeals recognized, "[t]he federal court system * * * cannot assume the role of a (quasi) public service commission for TVA ratepayers." Pet. App. Axl.[5]

---

[4] Petitioner also relies on 16 U.S.C. 831n-4(f), which provides that TVA shall charge rates for power that are sufficient to generate revenues for specified purposes and "such additional margin as the Board may consider desirable," all with "due regard for the primary objectives of the [Act], including the objective that power shall be sold at rates as low as are feasible." By its terms, however, that provision applies to the rates that TVA charges distributors. TVA's wholesale rates are not at issue here. In any event, Section 831n-4(f)'s broad delegation of authority provides no basis for judicial review even of the rates to which it applies.

[5] See *Mobil Oil Corp.* v. *Tennessee Valley Authority*, 387 F. Supp. 498, 506 (N.D. Ala. 1974) ("The fixing of rates

As the court of appeals noted, the courts have repeatedly refused to review TVA's setting of rates for its electric power. *E.g.*, *Ferguson* v. *Electric Power Bd.*, 378 F. Supp. 787, 789 (E.D. Tenn. 1974), aff'd, 511 F.2d 1403 (6th Cir. 1975); *Carborundum Co.* v. *Tennessee Valley Authority*, 521 F. Supp. 590, 593 (E.D. Tenn. 1981), aff'd, 705 F.2d 451 (6th Cir. 1982); *Mobil Oil Corp.* v. *Tennessee Valley Authority*, 387 F. Supp. 498, 506 (N.D. Ala. 1974); *Allen* v. *Electric Power Bd.*, 422 F. Supp. 4, 6 (M.D. Tenn. 1976), appeal dismissed, No. 76-2678 (6th Cir. Sept. 21, 1978); *Consolidated Aluminum Corp.* v. *Tennessee Valley Authority*, 462 F. Supp. 464, 474 (M.D. Tenn. 1978).

b. Petitioner's amended complaint also seeks review of TVA's alleged failure to enforce provisions of the Greeneville contract. As the court of appeals held, any review of those alleged omissions is squarely foreclosed by *Heckler* v. *Chaney*, *supra*. In *Heckler*, the Court recognized a presumption against judicial review of an agency's refusal to take enforcement actions, setting forth a number of reasons why inaction of that sort is generally unsuitable for review. 470 U.S. at 831-832. To rebut that presumption, the party seeking review must demonstrate that "the substantive statute has provided guidelines for the

---

which will balance and achieve all of these different objectives is a matter which Congress has entrusted to the judgment of the TVA Board, and which involves the clearest sort of commitment to agency discretion."). The courts have long recognized that TVA has been vested with broad discretion to achieve the congressionally declared objectives of the TVA Act. See *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 552-554 (1946); *Hoke Co.* v. *Tennessee Valley Authority*, 854 F.2d 820, 825-826 (6th Cir. 1988).

agency to follow in exercising its enforcement powers." *Id.* at 833.

As the court of appeals found, the TVA Act does not supply any standards that courts could employ in reviewing the propriety of an alleged failure by TVA to enforce the terms of a particular contract. Indeed, since the TVA Act provides the Authority with unreviewable discretion to select the terms of its contracts with its distributors, the statute cannot fairly be construed to contemplate judicial oversight of enforcement of the terms chosen by TVA in the exercise of that discretion.

2. Petitioner also contends that he and the class he claims to represent should be allowed to pursue an action against TVA as third-party beneficiaries of the Greeneville contract. Pet. 31-33, 47-50.

The general principles governing such claims are well established. A plaintiff seeking to enforce a contractual promise as a third-party beneficiary must demonstrate that the contracting parties intended the promise to be enforceable for his direct benefit [6]—*i.e.*, that the parties intended to confer a right on the plaintiff to sue for a breach of the particular promise at issue.[7] Those requirements are enforced with particular rigor with respect to government contracts.

---

[6] *E.g.*, *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912); *Tennessee Valley Authority* v. *Exxon Nuclear Co.*, 753 F.2d 493, 498 (6th Cir. 1985); *Beverly* v. *Macy*, 702 F.2d 931, 940 (11th Cir. 1983); *King* v. *National Indus., Inc.*, 512 F.2d 29, 32 (6th Cir. 1975); *Restatement (Second) of Contracts* § 302 (1979).

[7] *E.g.*, *Price* v. *Pierce*, 823 F.2d 1114, 1121 (7th Cir. 1987), cert. denied, 485 U.S. 960 (1988); *Nguyen* v. *United States Catholic Conference*, 719 F.2d 52, 55 (3d Cir. 1983); *Roberts* v. *Cameron-Brown Co.*, 556 F.2d 356, 362 (5th Cir. 1977); *Public Serv. Co.* v. *United States*, 5 Cl. Ct. 818, 820 (1984).

Because those contracts are often designed to serve some public purpose, it might often be said that a government contract was intended for the benefit of an indefinite number of people. In the context of such a contract, therefore, the courts have insisted on a very specific showing that the parties to the contract intended to provide for enforcement by third-party beneficiaries.[8]

Petitioner's claims that TVA may be held liable for breaches of the contract provisions that require Greeneville to employ FERC's accounting system and that provide for changes in the resale rate schedules fall far short of satisfying that requirement. There is no indication that the contract contemplates enforcement by non-parties of Greeneville's promise to employ FERC's accounting system; the obvious intention of that provision is to facilitate TVA's oversight of Greeneville's operations. In any event, a breach of that promise by Greeneville could not justify an award of any relief against TVA. With respect to provisions addressing rates, petitioner's fundamental contention is that TVA and Greeneville should have amended the contract to provide a lower rate schedule. The contractual provision providing for such modifications, however, is an "agreement to agree" admonishing the parties to take account of various

---

[8] *Berberich* v. *United States*, 5 Cl. Ct. 652, 655-656 (1984), aff'd, 770 F.2d 179 (Fed. Cir. 1985); *Johnson Controls, Inc.* v. *United States*, 8 Cl. Ct. 359 (1985), aff'd, 795 F.2d 1011 (Fed. Cir. 1986); *Reiner* v. *West Village Assocs.*, 600 F. Supp. 233, 238-239 (S.D.N.Y.), aff'd, 768 F.2d 31, 32-33 (2d Cir. 1985); *Nguyen* v. *United States Catholic Conf.*, 548 F. Supp. 1333, 1348-1349 (W.D. Pa. 1982), aff'd, 719 F.2d 52, 55-56 (3d Cir. 1983); *Schell* v. *National Flood Insurers Ass'n*, 520 F. Supp. 150, 157 (D. Colo. 1981). See also *Restatement (Second) of Contracts* § 313 (1979).

judgmental considerations.[9] By its nature, that type of provision makes the parties responsible for modifications and leaves non-parties with no specific promise to enforce.

3. Petitioner also seeks further review of the dismissal without prejudice of his claims against the non-federal respondents. The court of appeals held that the court lacked subject matter jurisdiction over those claims and that the district court did not abuse its discretion when it relinquished pendent jurisdiction after dismissing TVA from the action. Pet. App. Axl-Axliii & n.5. Petitioner contends that his claims arise under federal law because he seeks enforcement of a contractual provision requiring Greeneville to employ FERC's accounting system. Pet. 50-54. The fact that the contract between TVA and Greeneville incorporates an accounting system devised by a federal agency does not suggest that petitioner's contract claims arise under federal law for purposes of 28 U.S.C. 1331. See *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986).

---

[9] As noted, the contract provides that if the rates set forth in the resale rate schedule "provide revenues that are more than sufficient" to operate Greeneville's system "on a self-supporting and financially sound basis," then TVA and Greeneville "shall agree upon a reduction in said rates and charges, and [Greeneville] shall promptly put such reduced rates and charges into effect." Similarly, a provision obligating Greeneville to use its revenues to pay for operating expenses, debt service, new construction, and other purposes benefiting the system provides that "resale rates and charges shall be reduced from time to time to the lowest practicable levels considering such factors as future circumstances affecting the probable level of earnings, the need or desirability of financing a reasonable share of new construction from * * * surplus revenues, and fluctuations in debt service requirements." C.A. App. 41-43.

4. Finally, petitioner contends that the district court should not have acted on the respondents' motions for summary judgment without first allowing petitioner to take certain discovery. Pet. 55-58. Since petitioner's claims are insufficient as a matter of law, however, the requested discovery was immaterial and unnecessary. See Pet. App. Axlii n.5. In any event, the correctness of the district court's discretionary ruling presents no question calling for this Court's review, and petitioner waived his right to seek appellate review when he failed to make a timely objection to the magistrate's order staying discovery. See Fed. R. Civ. P. 72(a); *Thomas* v. *Arn*, 474 U.S. 140 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S. CHRISTENBURY
General Counsel
Tennessee Valley Authority

JAMES E. FOX
Deputy General Counsel

ROBERT C. GLINSKI
Assistant General Counsel

THOMAS C. DOOLAN
Senior Litigation Attorney
Tennessee Valley Authority

OCTOBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45110